INCREASE PENALTIES FOR COMMON CARRIER VIOLATIONS OF THE COMMUNICATIONS ACT OF 1934

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1765

MAY 17, 2001

Serial No. 107–27

Printed for the use of the Committee on Energy and Commerce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

72–835PS WASHINGTON : 2001

For sale by the Superintendent of Documents, U.S. Government Printing Office
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THURSDAY, MAY 17, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123 Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, barton, Stearns, Deal, Largent, Shimkus, Pickering, Fossella, Davis, Ehrlich, Terry, Tauzin (ex officio), Markey, Engel, Green, McCarthy, Stupak, Harman, Sawyer, and Dingell (ex officio).

Staff present: Howard Waltzman, majority counsel; Yong Choe, legislative clerk; and Andy Levin, minority counsel.

Mr. UPTON. Good morning. Today's hearing is an important one to both sides of the broadband issue, and I believe that consumers are best served by competition in the free marketplace.

I support the deregulatory goals of the Tauzin-Dingell bill, but I also believe that enhanced enforcement is an important ingredient in the mix. My door has been open to everyone since I became chairman, and in many meetings with CLECs and long distance providers over the past number of months one note that they consistently sounded was enforcement, enforcement, enforcement.

I took that to heart and as chairman I have set about to strengthen the FCC's enforcement authority as the debate over the Tauzin-Dingell bill unfolded. And I am pleased that today the question is not any more if Congress will strengthen the FCC's enforcement, but when and how much.

Today my goal is to seek consensus on what I believe is a common sense measure. It is a measure that I believe is firm, and it is also fair. We need to put this in proper context. While I strongly believe that we need to enhance the FCC's enforcement authority, it is important to recognize the entirety of enforcement regulation which ILECs currently face at both the Federal and State levels, none of which are mutually exclusive.

Take the ILECs for example. At the Federal level, there is Section 208 of the Communications Act, which enables any company or person to file a complaint at the FCC against an ILEC for damages due to alleged violations of the Act.

If damages are awarded by the FCC, the ILEC cuts a check directly to the aggrieved party. There is no cap on those damages, and the same goes for long distance companies.

Then, there is Section 503, which deals with forfeiture penalties. These cases are brought by the FCC. If the FCC finds that an ILEC has violated the Act, rules, or regulations, the FCC can order a forfeiture penalty against the ILEC. And in these cases the check is cut by the ILEC to the U.S. Treasury. The same goes for long distance companies.

In addition to this, certain ILECs have conditions imposed by the FCC as a result of mergers, which have mandated requirements and fines. Often these fines are an amount which exceed the forfeiture caps found in Section 503, which H.R. 1765 would substantially increase.

On top of this, the ILECs have obligations imposed on them by the States, and there are literally millions of performance measures which if not met result in automatic payments by the ILECs to the CLECs and/or the State treasury in a given State.

All of this swirls around companies which by and large are good corporate citizens engaged in certainly a highly competitive, highly complex business, with massive regulatory obligations. They employ thousands of people in communities throughout our country trying to deliver a quality service to consumers at affordable rates.

These are complex issues, and I wish there was a silver bullet. But I do know this: we need to give Chairman Powell and his colleagues more ammo to do the jobs, so that they can enforce the law.

As everyone here knows today, my bill increases tenfold the current forfeiture authority of the FCC, from the current $100,000 up to $1 million per violation, and $1 million up to $10 million for a continuing series of violations, and for repeat offenders these penalties are increased up to $2 million per violation and up to $20 million for a continuing series of violations.

And we also expand the statute of limitations for FCC enforcement actions from 1 to 2 years and provide the FCC with a cease and desist authority as an additional enforcement tool. We have added language that streamlines the State PUC procedures for resolution of disputes regarding interconnection agreements, and this language is identical to the amendment which Mr. Terry offered.

In this important provision, however, I think there may be some misunderstanding, so I want to set the record straight. To the extent that carriers disagree about their obligations under interconnection agreements, H.R. 1765 would provide a fast track process through which the State PUCs would determine what the obligation of the carriers actually are.

In the absence of State action, the FCC is still permitted to step in and act in this regard. Moreover, for the record, and most importantly to today's debate, this provision would not in any way limit the FCC's authority to enforce the Act, and we will clarify that further in the bill if we need to do so.

As many of you know, I will seek to make an enforcement amendment in order in conjunction with the Tauzin-Dingell bill, H.R. 1542, makes its way through the legislative process with the Rules Committee.

And I certainly appreciate the strong support of Chairman Tauzin and ranking member Dingell for that effort, and I am anxious to seek the input of all members as we move this process along.

And I yield to my friend and colleague, Mr. Markey, for an opening statement.

Mr. MARKEY. Thank you, Mr. Chairman, very much, and thank you for having this very important hearing.

It is very clear that the current forfeitures and penalties available to the Federal Communications Commission are woefully inadequate to act as a deterrent to multi-billion dollar enterprises. As FCC Chairman Powell noted in his testimony to the subcommittee recently, the current fines are merely a cost of doing business for many of the companies in question.

In other words, the corporate calculation appears to be that it is often cheaper to pay the fine than to do what the law requires, because to do what the law requires may actually result in more competition, and that is more costly to dominant carriers than paying puny fines every quarter for non-compliance.

The first issue when looking to give the FCC additional tools to focus on enforcement is whether we are prepared to give the Commission the human resources necessary to make any increase in forfeitures or enforcement of standards meaningful. Will we assure Chairman Powell that he will have adequate skills, staffing, to act as a cop on the beat?

We can have all the fines and penalties in the world, and it will do little good, in my view, if there isn't anyone available to investigate a violation or adjudicate a dispute. If we are going to increase fines, penalties, and forfeitures, I think we need to explore further what level of fines actually acts as a deterrent to the already high rate of recidivism amongst several carriers.

It makes little sense to take action merely to raise fines from trivial to paltry. In addition, we ought to explore whether enforcement action can be carried out on an expedited basis and if any applicable fines should be payable to the aggrieved party in a dispute. It does entrepreneurial companies little good if many months or years after a violation or serious dispute they are posthumously vindicated.

The marketplace simply moves too fast, and slow enforcement in many cases may wind up being the same as no enforcement in many emerging markets. I think it would be much better if these fines went into the pockets of the entrepreneurial companies which were injured rather than into the pockets of bureaucrats in the Federal Government.

I think that that would be a much greater threat to the large carriers across the country. If they harm someone, the government found them to be liable, and then those entrepreneurial companies received the fines. That would be a real threat and completely I think eliminate the likelihood in many instances that these large carriers would try to destroy the small companies.

Moreover, we must explore as well the relationship between fines and penalties levied at the State level and those at the FCC. Our fines and penalties at the FCC should be considered in addition to any action a State takes, to take precedence over State action, and

do monetary damages capped at the Federal or State level count fines levied by the other jurisdiction? This needs to be clarified.

And, finally, I just want to mention a procedural point. This legislation represents a series of proposals on which subcommittee members may find a great deal of consensus. I am concerned that this bill has been described as a floor amendment to the Tauzin broadband legislation on which there is little consensus in the committee and no apparent interest in the Senate.

Moreover, that legislation has the effect of decriminalizing many of the rule violations that are today in need of enforcement in order to ensure fair competition. I would hope that if we truly aim to increase enforcement of our laws and to be responsive to Chairman Powell's suggestion that we should attempt to get these proposals enacted into law, then perhaps we should move this bill separately and swiftly, so that the penalties at least are on the books, and the small companies are protected even as we debate the Tauzin bill I think for a very long period of time.

So, again, I want to commend you, Mr. Chairman, and at this point I yield back the balance of my time.

Mr. UPTON. Thank you. Does that mean we can list you as a cosponsor?

Mr. MARKEY. As long as all these corrections are made exactly as I detailed them, yes.

Mr. UPTON. We recognize the chairman of the full committee, Mr. Tauzin.

Chairman TAUZIN. Thank you, Mr. Chairman. Mr. Chairman, I would like to observe this is the first time I have heard a deregulation bill described as a decriminalization bill. H.R. 1542 deregulates; it doesn't decriminalize. It simply deregulates the provision of broadband service, and I want to make that clear on the record.

And I want to thank you for this common-sense approach to address concerns that were expressed throughout the telecom industry and by the FCC. The current enforcement regimes of the FCC and the State commissions do not adequately police bad conduct on the part of common carriers.

Enforcement of the 1996 Communications Act provisions with respect to obligations of common carriers is critical for competition to survive and to thrive. And the Act imposes responsibilities on common carriers that are indeed designed to ensure that the markets for both local and long distance telephone service are open and competitive.

The problem is that the enforcement of those obligations is generally considered as a part of the common carrier's desire to enter a long distance business under 271 provisions. Currently, I think there are only two applications before the Commission. I think it is SBC's application for Missouri and Verizon's application in Connecticut. So that is the only place the Commission has any interaction with provisions of the Act designed to open the local markets in Missouri and Connecticut.

The rest of the States lack that constant enforcement of the Act's provisions until the Bell companies in those States actually make application for long distance entry. So as we move the bill that was passed through our full committee, H.R. 1542, which does in fact

deregulate, not decriminalize, the provision of broadband services by telephone companies to Americans, it is important that we consider this measure to strengthen the enforcement rules that underline telephone service and the telephone infrastructure.

The reason that becomes more important, obviously, is because the critics of 1542 argue that to deregulate broadband takes away one of the incentives from the common carriers to properly deregulate the local loop.

Well, regardless of what incentives exist or don't exist, if we impose upon the Commission both the obligation and the authority to enforce the rules of open entry in the local loop, we are going to get that situation corrected. In fact, hopefully much sooner than later.

The Upton bill does that. The bill increases the penalties that the FCC may impose on common carriers to a level that is far beyond just the cost of doing business. Some of the opponents of the broadband bill have attempted to dismiss the penalties as paltry and compare them to the annual revenues of the Bell operating companies. That argument is disingenuous at best.

The Upton bill would increase the penalties tenfold for each violation of each day of a continuing violation. While the cap on a continuing violation is set at tenfold the current limit, I think the opponents of the bill fail to recognize that the cap only affects any single act or failure to act. Multiple violations would be accompanied by multiple million-dollar penalties.

The total amount of these penalties could certainly far exceed what the opponents of this bill would like people to believe. The legislation also provides a shot clock for the resolution of disputes that arise out of interconnection agreements, and this is extremely important.

The State commissions are currently charged by the Telecommunications Act with arbitrating interconnection agreements if parties cannot reach those agreements themselves. Interconnection agreements are critical for opening up local loop competition. And, therefore, the State commissions are in the best position to resolve interconnection disputes once they have been agreed to.

If the parties disagree about their obligations under an interconnection agreement, then the States should, on a fast track basis, tell the parties what their obligations are. And the Upton bill makes the State commission the exclusive administrative remedy, so that a party that loses before a State commission does not prolong the dispute by appealing to the FCC for a different outcome.

It empowers the State commissions to open up the markets much sooner. And this type of forum shopping that currently goes on undermines the enforcement of these interconnection agreements. The bill still preserves the authority of the FCC to take action in the absence of State action, but it gives and empowers the States with more authority to get the ball moving.

In addition, the FCC would still have the authority to impose fines or violations of the Commission's Act and the FCC rules. Critics of this bill argue that this bill is meaningless because H.R. 1542 deregulates everything, and, therefore, there are no regulations left to enforce. That is simply not true.

H.R. 1542 only applies to broadband services. It doesn't apply to telephone exchange services, nor to the facilities used to provide telephone exchange services. So even after the enactment of the broadband bill, there are plenty of rules for the FCC and the States to enforce—in fact, the most important rules, to open up those local markets in telephone service.

And what critics of H.R. 1542 also know, but they won't tell you, is that a CLEC can use the underlying telephone infrastructure to provide broadband services. And the rule governing the availability of that infrastructure to CLECs has not been undermined by H.R. 1542.

Mr. Chairman, I applaud you for introducing the legislation and holding a hearing. I am extremely disappointed that the critics of the broadband bill have lashed out now against your bill in a thinly veiled attempt to derail the broadband bill.

Opponents of 1542 recognize that marrying the broadband bill with your bill on the floor, which I am committed to ask the Rules Committee to do, will give members an even stronger reason to vote for H.R. 1542. So instead of offering Chairman Upton constructive recommendations of how this bill could be improved, too many opponents have simply criticized the bill without those recommendations.

We welcome recommendations on how to make this a better and a stronger provision. If the critics of H.R. 1765 are serious about improving enforcements of the Communications Act, they should do so.

And, Mr. Chairman, I want you to know that I intend to continue to work with you as we move forward to the Rules Committee to ensure that the language you so carefully drafted with so many other members of this committee is, in fact, improved to the point where we can ask that it be added to the broadband bill, and will make that bill a much stronger bill and, more importantly, will serve as an underlying authority and responsibility on the FCC to open up local telephone markets the way they should have been opened up for many years.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you. I recognize for an opening statement ranking member of the full committee, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I thank you. And, Mr. Chairman, I commend you for holding this hearing on H.R. 1765 and for your leadership in offering that legislation. I commend you and all of the original co-sponsors for taking such quick action on what is a very important issue.

Chairman Powell has indicated that he has grave need of additional authorities and additional penalties. This confers upon the Commission the necessary authority to properly enforce the rules and regulations which they lay forth.

It also affords us an assurance that people will listen with respect when the Commission addresses problems, and will perhaps enable us to substitute real, meaningful penalties for the kind of foolish constraints that have been imposed on the development of not only the broadband but internet and all the rest of telecommunications, because of the inability or unwillingness of the

Commission to do the things that it was supposed to do under the Telecommunications Act.

For years this committee has heard a tirade of complaints and accusations leveled against companies on both sides of the telephone wars. The new entrants to the telephone market accuse incumbent carriers of violating Telecom Act by not opening their markets to competition.

Incumbents, in turn, charge the new entrants with bad faith, claiming that they cherrypick their best customers, and purposely don't serve residential customers in order to keep the bells from getting approvals to enter long distance. I suspect that there is substantial truth to both, but particularly to the last part.

I sincerely doubt that either side has a monopoly on the truth. Thankfully, it is not our job to adjudicate the situation. Rather, it is our job to correct a situation which is impeding a number of important goals of this Congress. The first is competition. The second is broader service. The third is that we will see the law—the Telecommunications Act implemented as we had intended.

However, we are now addressing this morning one important aspect, and that is we can make sure that if and when the law is broken it is remedied in a meaningful fashion and that penalties can be brought forward by the FCC in a way which will enable them to carry out their important mission.

H.R. 1765 does, then, what we want. It substantially increases penalties for all common carriers for wrongdoing. It gives the FCC more authority and more flexibility to pursue violators, and I challenge anybody to come forward with a meaningful criticism or complaint about that.

The bill provides ample deterrent to protect all telecommunications companies from anti-competitive behavior in the marketplace. And just as important it provides consumers with additional protections against slamming, against cramming, against telecommunications marketing abuses, and many other violations of the Act—something which currently the FCC lacks.

The bill is a good one. I support it. However, there is one significant improvement which can be made to the bill, and I hope that you and the other co-sponsors will work with me to incorporate those changes that would implement that as the bill moves forward.

I would note that violations of the Telecommunications Act ultimately harm telephone consumers. I believe it is only fair that the fines paid by the violators should flow back to benefit the consumers, and I would note that the consumers have great difficulty in terms of getting redress for wrongdoing which is done to them.

I note that the CLECs have their hot little hands out to get this money themselves. I see no reason why the CLECs could not be enabled to continue to function as they can by a proper lawsuit against other wrongdoers in the telecommunications industry as opposed to having us confer upon them a large wash of money and the opportunity to generate new and frivolous complaints against others in the telecommunication industry.

Therefore, I would propose that all fines and penalties be earmarked to reduce dollar for dollar the amount of the universal service surcharge that is currently collected from residential tele-

phone consumers. I would like to note that this universal service surcharge is an extremely important part of assuring universal service, of seeing to it that the things that need to be done by our telecommunications service and system are available to everyone at an affordable cost, something which has made this country unique in terms of the availability of service to our users.

To be clear, and I want to make that so, this proposal will not in any way reduce the amount of funding available for the e-rate program. It would simply reduce the amount of money that is collected from our constituents to pay for it by seeing to it that the fund is enriched by fines collected from wrongdoers.

In this way, monthly telephone bills can still go down while still funding this important program. I hope we can work together to flesh out the details of this provision. I recommend its inclusion as an amendment on the floor.

And, Mr. Chairman, I thank you for holding this hearing. It is a valuable one. And I yield back the balance of my time.

Mr. UPTON. Thank you. I would recognize for an opening statement Mr. Stearns.

Mr. STEARNS. I thank the chairman and commend you for holding this hearing on H.R. 1765. I am proud to be an original cosponsor of this bill.

And also, Mr. Chairman, I would like to recognize one of our witnesses this morning, the Chairman, Leon Jacobs, Jr., of the Florida Public Service Commission. I want to thank him for coming here. I understand it was pretty short notice, so we appreciate your coming here and welcome you.

The Telecommunications Act, as we all know, is over 10 years old now. It is now half a decade old. And during that markup we thought we had solved all these problems. And we are coming back, and I think rightfully so, with legitimate enforcement mechanisms.

This bill that we are marking up now I support. It is a similar bill that Mr. Upton and I offered during the consideration of H.R. 1542, the broadband deregulation bill. The committee accepted one of my amendments creating specific and severe penalties totaling up to $10 million for failure to comply with specific legislation, but the amendment that Mr. Upton and I offered enhancing the FCC's enforcement authority under Title V of the Communications Act was determined not to be germane.

So I am glad that Mr. Upton has put this together in a separate bill, and so I look forward to the hearing today. I would say to my colleagues I don't think this bill in any way is intended to favor ILECs or CLECs or IXCs over one another. I think it is something that Mr. Powell, the Chairman of the FCC, has called for, and I think we should go ahead and go forward.

I think many on both sides of this issue will complain about the bill. And whether it should be part of the broadband bill, as the chairman indicated, I think is prudent, and I think it would help his bill. But as Mr. Markey has indicated, maybe it is a bill that we should mark up separately and get through and get moving, and I think that would be dependent upon how quickly this broadband goes to the Rules Committee and comes on the House floor.

So, Mr. Chairman, I commend you for what you are doing. I think that we are moving in the right step forward here, and I yield back the balance of my time.

Mr. UPTON. Thank you. I would recognize for an opening statement Ms. McCarthy.

Ms. MCCARTHY. Thank you, Mr. Chairman, for holding this important hearing on enhancing enforcement mechanisms in the Communications Act of 1934. I look forward to the testimony of the witnesses on this issue and the dialog that will follow.

One of the promises of the 1996 Telecommunications Act was competition in the local phone service market. Congress removed many regulatory barriers, with the expectation that it would promote competition and benefit the public interest. Sections 251, 252, and 271 of the Act were designed to give competitors access to incumbent local exchange carriers' facilities as well as provide incentives to incumbents to open their networks up to competitors. Despite our efforts to create a competitive local phone service market, most consumers have no choice in local phone service providers. Notwithstanding the efforts of Birch Telecom in my district, in my home State of Missouri, less than 1 percent of residential and small business consumers are provided service by a competitive local exchange carrier. Nationally, only 3 percent of residential and small business consumers receive local phone service from a CLEC. Clearly, competition is not flourishing.

When Congress drafted the Telecommunications Act of 1996, it recognized how difficult it would be to foster competition in a former monopoly market. Incumbent phone companies have little incentive to open up their networks to competitors even when provided with incentives such as those provided under Section 271. CLECs have complained repeatedly that incumbents have used a variety of tactics to stymie competition. Failure to pay reciprocal compensation payments, long delays in orders for provisioning unbundled network elements, and charging above-market rates for wholesale services are just some of the actions used by incumbents to hinder the ability of CLECs to operate. FCC Chairman Michael Powell recently stated in a letter to the leaders of this subcommittee that "CLECs may have been stymied by the practices of incumbent local exchange carriers that appear designed to slow the development of local competition." In that letter, the Chairman goes on say that current FCC authority is insufficient to enforce the local competition provisions of the Telecommunications Act. As Mr. Markey noted, anti-competitive behavior is not deterred, and fines are incorporated into business plans as a cost of doing business. These costs are inherently borne by consumers who end up paying higher bills.

I am interested in hearing from the witnesses on what sections of the Communications Act need to be revised to give the FCC and the State public utility commissions the authority they need to stringently enforce the Act's market-opening provisions.

My PSC commissioners have several reservations about the bill that Mr. Jacobs will comment upon. My questions concern whether the changes made are really enough to deter anti-competitive behavior by incumbent phone companies. What other areas should this legislation address, if any, to make it stronger? Does Congress

need to appropriate additional moneys to the FCC for its enforcement responsibilities?

There is a general consensus among many of the members of this subcommittee that the FCC and State public utility commissions need greater authority to enforce the provisions of the Communications Act. I have heard from many in the telecommunications industry, as well as from consumer groups, but neither the FCC nor State public utility commissions have the enforcement tools they need to uphold the provisions of the Communications Act or regulations and orders stemming from it. I want to commend Chairman Upton for introducing this legislation and holding a hearing on this important matter. I hope the subcommittee will hold additional hearings on enhancing enforcement tools and move this legislation as a stand-alone bill. This issue is too important to be incorporated into H.R. 1542, the Internet Freedom and Broadband Deployment Act, a bill whose future is uncertain.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. UPTON. Thank you. I would yield to Mr. Terry for an opening statement.

Mr. TERRY. Thank you, Mr. Chairman. I want to express my appreciation to you for the way that you have handled these issues, molding them into a single bill and holding this hearing today. It is rare that I actually engage in an opening statement and have a formal statement.

Well, it is almost 11, and we haven't yet come close to hearing from the witnesses. So if you will allow me, I am going to submit the formal statement and yield back the rest of my time.

[The prepared statement of Hon. Lee Terry follows:]

PREPARED STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. Chairman, I want to commend you for holding this hearing on H.R. 1765.

Last week during our markup of H.R. 1542, we discussed the importance of enforcement and giving the Federal Communications Commission (FCC) what they need to make the fines they levy no longer trivial. A number of good ideas surfaced during the markup not germane to H.R. 1542. I commend Chairman Upton for taking our ideas and crafting H.R. 1765, a bill that will put the "teeth" back into FCC enforcement.

I want to bring to the attention of the committee a situation that happens all the time between the Incumbent Local Exchange Carriers (ILECs) and the Competitive Local Exchange Carriers (CLECs). In order for a CLEC to offer service over an ILEC's lines, the two parties must develop an interconnection agreement. In that agreement, both parties will agree to they types of services and facilities, and the prices at which services and facilities will be provided CLECs. For example, as part of an agreement, the ILEC will agree to provide loops to the CLEC within a certain timeframe. If they fail to do so, they would be in violation of the interconnection agreement.

When a violation occurs, both parties must come together to solve the problem. However, if no resolution occurs, then the issue is sent to the state public utilities commission (PUC) and waits for the commission's decision. The problem is that the state PUC does not have to rule in a timely manner, which can be devastating to the CLECs, some of who do not have enough money to endure a protracted investigation or hearing.

Mr. Chairman, you have addressed this concern in Section 2, by including the remedy that will bring disputes between the ILECs and CLECs to a quick resolution. Section 2 will give those CLECs, who find themselves in front of a state PUC, hope that in 60 days, a decision will be made. Granted, the decision may not be in their favor, but nevertheless, a decision will be made.

Mr. Chairman, this enforcement section will allow any party to petition the State commission to arbitrate a dispute that has occurred from the interconnection agree-

ment. The non-petitioning party may respond to the other party's petition and provide additional information to make their case. The State Commission may ask for additional information if necessary. If any party refuses or fails to respond in a timely basis to the request, the commission may proceed with the information they have before them. Once the petition is filed, the State Commission will only have 60 days to resolve the dispute. It is that simple.

I believe very strongly in the need to establish limits on resolving disputes between the CLECs and the ILECs. Section 2 of H.R. 1765 is an effective way of doing just that.

Mr. Chairman, thank you again for this hearing. I yield back the balance of my time.

Mr. UPTON. Without objection, all members of the subcommittee will be afforded the opportunity to introduce their opening statement as part of the record.

Ms. Harman?

Ms. HARMAN. Thank you, Mr. Chairman. I am sorry that I won't be able to stay for all of the testimony because of a conflict, but I did want to come to say that I applaud you for trying to add penalties to the Telecom Act of 1996, a bill I voted for and I think the cornerstone of our telecommunications policy.

I know there may be some issues relating to this amendment, but I think it is important that if Congress carefully fashions a law we provide adequate penalties to enforce it. And in that regard I truly applaud you for taking advantage of this opportunity to get that job done.

Fines and penalties cannot be a cost of doing business. Fines and penalties have to hurt enough so that they deter wrongful conduct. I know that is what you are trying to accomplish here, and I want to work with you and with the committee to ensure that penalties and regulations are effective.

Thank you very much.

Mr. UPTON. Thank you.

Mr. Largent?

Mr. LARGENT. Thank you, Mr. Chairman. I will make brief remarks, too, and just say that this is important legislation. My only concern is knowing that Chairman Tauzin intends to include H.R. 1765 as an amendment to H.R. 1542, and when it is considered on the floor, my concern is is that if for some reason something doesn't happen with the broadband bill in the Senate or on the floor, whatever, that we don't ever get to H.R. 1765.

And so my hope is is that we would be able to introduce this independently if, for whatever reason, the broadband bill stalls out, because it is important.

And I also want to make a note that yesterday in a speech to the National Press Club Ed Whittacker, the Chairman and CEO of SBC, stated that SBC has to comply with over 3 million performance measures on a daily basis to stay in compliance. And I will be interested in hearing from Mr. Solomon, the Chief of FCC's Enforcement Bureau, how many of those 3 million performance measures do we really need.

And with that, Mr. Chairman, I will yield back my time.

[The prepared statement of Hon. Steve Largent follows:]

PREPARED STATEMENT OF HON. STEVE LARGENT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. Chairman, thank you for holding this morning's hearing to examine legislation which will grant the Federal Communications Commission (FCC) greater enforcement penalties and fines in an effort to achieve compliance with the Communications Act of 1934. In a perfect world there would be no need for a Section 503(b)(2)(B) or a Section 208 to act as a deterrent for anti-competitive behavior by common carriers. However, to my knowledge that type of perfect world doesn't currently exist in the communications industry. Therefore, it is incumbent upon Congress and the FCC to play the role of an honest broker to maintain an even playing field and to preserve a modicum of competition.

I believe H.R. 1765 is a good faith attempt to put all carriers on notice, be they incumbent local exchange carriers (ILECs), long distance carriers, and/or competitive local exchange carriers (CLECs) that strong and effective enforcement is critical to implement the '96 Telecom Act. It appears that the FCC's current ability to levy fines and penalties are insufficient to discourage ILEC anti-competitive behavior. To quote from Chairman Powell's May 4, 2001 letter to Chairman Tauzin, "Given the vast resources of many of the nation's ILECs, this amount is insufficient to punish and deter violations in many instances."

I believe that the enactment of this legislation will enhance the FCC's ability to police the '96 Act; however, I do have serious reservations linking the success of H.R. 1765 to the success or failure of H.R. 1542. It defies logic to link these two bills at the Rules Committee. H.R. 1542 is an Internet broadband deployment bill which precludes any State or federal regulatory or enforcement authority. H.R. 1765 is a circuit-switch voice enforcement bill. These conflicting bills, if combined, will only cause greater confusion to an already contentious issue.

Enforcement is important—but enforcement needs to be based on reasonable and fair standards. SBC, the incumbent local carrier in Oklahoma, tracks nearly 3 million measures of its performance each month to comply with Sections 251, 252, 271 in its 13 state service territory region. This effort requires 172 full time personnel and millions of dollars in compliance costs. Clearly, it is virtually impossible to maintain a 100 percent compliance rate with 3 million performance standards.

Southwestern Bell-Oklahoma's performance in providing wholesale service to CLECs, as measured by the FCC and endorsed by Justice in the Texas, Oklahoma, and Kansas Section 271 proceedings is consistently the best performance turned in by all of the SBC service territory states. SBC-Oklahoma average performance this past year has been 93.5%, a truly commendable achievement.

In closing, it's imperative that Congress grant the FCC effective and meaningful enforcement tools to implement the '96 Act. But it's equally important to allow the Bell companies to have a reasonable and manageable number of performance standards with which they will have to comply. Otherwise, we are doing nothing more than creating a lot of busy work.

I look forward to hearing from our witnesses.

Mr. UPTON. Thank you.

Mr. Sawyer?

Mr. SAWYER. Thank you, Mr. Chairman, not only for holding this hearing but for your insightful one-panel policy. It is a benefit to everybody.

Let me associate myself with the remarks of the gentleman from Nebraska with regard to his opening statement and keep mine brief as well, associate myself with the comments of the gentleman from Michigan, particularly with regard to his thoughts on the universal service fund and the way in which that might take advantage of the efforts that we undertake here today.

With that, I would yield back the balance of my time.

Mr. UPTON. Mr. Fossella?

Mr. FOSSELLA. No statement.

Mr. UPTON. Mr. Pickering?

Mr. PICKERING. Thank you, Mr. Chairman, for this hearing. And as we look at enforcement and opening the access to the local network to promote competition, I am still concerned that with this provision or this legislation, 1765, when you pair it with the legis-

lation that we passed in the last week, the broadband bill, it is still fundamentally flawed, because you are removing the elements through interconnection and unbundling.

We are cutting off capital. We are cutting off access to the network. We are undermining the core elements of the 1996 Act that would promote local competition.

So if you remove the elements with one hand and then say, "We are going to enforce something" on the other hand, there is nothing there left to enforce to open the markets for local competition. So until that fundamental flaw is repaired and corrected, the enforcement provisions that we are talking about today are somewhat meaningless.

The other problem that we see is if you cap at $10 million the penalties for companies that are in the $60- and the $70- and the $80 billion, in revenues per year, a $10 million insurance policy in an $80 billion a year business is basically a free path to say we can violate every law there is and just pay $10 million.

So the penalties are insufficient, and we need to look at how we can strengthen not only the FCC authority on penalties, but what are some of the other non-monetary things that can be done to strengthen the FCC's hand, whether it is prohibitions on marketing, other types of prohibitions that would not disrupt the consumers' service but would be something that would be a true incentive for companies to comply—performance matrixes and performance contracts, looking at treble damages, if companies are violating these laws, everything that we can do to promote competition.

And until we repair that side of it, it is hard to discuss entry into new markets without compliance of 251, 252, 271. When we get that balance, then I think that we are on the right path. But until then, we are still operating in a context which, in my view, is unworkable. I look forward to making it workable and making something that is both on the enforcement side and the local competition side, and then we can look at entry for the Bells.

I do want to see competition in local markets. I want to see competition in the data market. I want to see competition in long distance. But we have got to—but we have to make sure that we have a balanced and sound framework to be able to do so.

With that, I yield back, Mr. Chairman.

Mr. UPTON. Thank you.

Mr. Engel?

Mr. ENGEL. Thank you, Mr. Chairman. I very much appreciate the work that you and our other colleagues have done on enforcement issues of the FCC. I think that we all recognize that the existing fines are meaningless to the multi-billion dollar per year industry.

Of course, we all wish that the common carriers met their obligations without such threats, but in this industry there must be a referee, and the referee must have the power to send a player into the penalty box.

I also appreciate that we are actually having the hearing on this. I am supportive of changing these enforcement provisions to better reflect today's situation. But when these questions came up at the recent markup, I felt as if I didn't have enough information to

judge what the proper level should be. So this is my opportunity to learn more, and I think it is very, very helpful.

My overriding principle, Mr. Chairman, is that these enforcement provisions be applied to all common carriers. I know that some believe we should have a different, higher set for the RBOCs, but I believe that just isn't fair. The Federal Government is not supposed to choose sides in the marketplace.

The bill offered by my friend, the chairman, also streamlines the procedures that the States use to resolve disputes regarding interconnection agreements. I believe giving the States more authority is necessary. The FCC does not have the resources it needs to do all that we ask.

With such higher penalties, I suspect that challenges will increase and that demands on the time of the FCC staff will increase. Bringing the States into this earlier and granting them greater authority will relieve the FCC of some of the burden we have placed upon it.

So I thank you, Mr. Chairman, for giving us this opportunity. I do think it is necessary. I just want to make sure that we are doing it right.

Thank you.

Mr. UPTON. Thank you.

Mr. Ehrlich?

Mr. EHRLICH. Real briefly, Mr. Chairman, I thank you for the hearing. It is timely and important. I also want to give a kudo to the chairman. I think the process he has adopted here does make sense, subject to some of the caveats expressed by my colleagues here.

I do want to associate myself with the remarks made by my colleague from Oklahoma and particularly Mississippi, and hopefully the testimony will focus on the FCC and what the FCC needs in the way of additional enforcement. This has been a very difficult issue for all of us, and I will yield back.

Mr. UPTON. Mr. Green?

Mr. GREEN. Thank you, Mr. Chairman. As the original co-sponsor, I support and believe this legislation will be a real benefit to any consumer with a phone line. Back in March when Chairman Powell came before our subcommittee and told us that the FCC needed expanded enforcement authority, I and you and a number of other members agreed with him.

The current cap on common carrier fines are too low to serve as an effective barrier against anti-competitive behavior by our common carriers. Consumers don't care whether it was a CLEC or an ILEC that they just were slammed or crammed by. They care about fixing the problem and making sure that it doesn't happen again, and that the companies conducting these illegal practices are held accountable.

After reading the testimony today of the witnesses, there is clearly differing opinions on whether the legislation goes too far or not far enough. This bill encompasses the vast majority of the suggestions put forth by Chairman Powell and is a reasonable compromise, giving the FCC new powers for competition.

In addition, Mr. Chairman, I want to thank you for working with us and including reporting language in the bill that is part of the

bill that we put in. Chairman Upton proposed increasing the levels of fines against common carriers. And I believe it is important to closely monitor whether our actions have a positive impact on the industry.

Reporting provisions, including this legislation, require the FCC to report to Congress where there are increasing or decreasing—decreases in common carrier violations as a result of the passage of this bill. If reporting shows increases in common carrier violations, I would hope we consider raising the fines again to promote better compliance.

My Mississippi colleague is correct that we need to make a good point that penalties should be enough to stop the improper activity. And, again, I am glad, Mr. Chairman, that we have this bill, and hopefully we will be able to deal with it in an expeditious manner. Thank you.

Mr. UPTON. Thank you.

Mr. Deal?

Mr. DEAL. No statement.

Mr. UPTON. Mr. Davis?

Mr. DAVIS. Thank you, Mr. Chairman.

We thank you for your willingness to work with us on the issue we have before us today. I think it is clear that in introducing H.R. 1765 you are committed to changing the current practices of telecommunication providers who view the threat of monetary penalties under the Communications Act as small speed bumps on their violative actions rather than a concrete wall that would actually deter illegal business practices.

For that reason, and in light of Chairman Powell's May 4 letter on this matter, I applaud your bringing this issue before the subcommittee so quickly.

I remain troubled by the fact that this important legislation which applies to all common carriers is being linked to legislation that directly benefits only one segment of carriers. These are companies who would not even be subject to the provisions of H.R. 1765 by virtue of their exemption from FCC and State authority under the operation of H.R. 1542.

Certainly, a fair discussion of enforcement and the appropriate level of deterrent penalties is needed, but I wonder whether a single hearing with no opportunity to further study H.R. 1765 beyond today is giving it less than the attention it deserves.

Since we are discussing a universe of telecommunications carriers that differs from those affected by H.R. 1542, I really believe its impact requires a much better understanding by members of this subcommittee than we are going to be able to gather just at this hearing. And to bring this bill to the House floor without further debate I think is a little premature.

As you know, Mr. Chairman, I offered an en bloc amendment last week during our full committee markup of H.R. 1542 that would have achieved two things. First, it would have required the FCC to adopt clearly discernable performance metrics that will create standards by which we can determine whether an RBOC, for example, is cheating.

However, these standards would have deferred to State laws and rules if a State commission had performance standards in place.

And, second, the amendment would have increased significantly the monetary penalties for a Bell companies violation of these standards.

I would note that the motive for directing these penalties to the Bell companies only was based on the fact that the underlying objective of H.R. 1542 was to provide deregulatory relief that would singularly benefit the Bells. While I think it is prudent for the subcommittee to heed Chairman Powell's request that the FCC be given the authority to levy forfeiture penalties of at least $10 million, the numbers themselves are not necessarily the most critical part of the debate.

The most important point for us as legislators is to explore an analyze the current landscape of regulatory enforcement that has produced an environment where a $10 million penalty translates into simply a cost of doing business with respect to a carrier's bottom line.

As I noted last week, the RBOCs together have encouraged over $492 million in Federal and State penalties since December 1999. I think we need to understand better, Mr. Chairman, why carriers are willing to incur these enormous costs, and I am not certain that a single hearing with a four-member panel is going to be able to give us enough information to make that determination.

Aside from your intention to offer H.R. 1765 as an amendment to H.R. 1542 on the House floor, it is my hope this issue is one that the subcommittee will be able to flesh out further. I look forward to helping you in any way in making this possible.

Thank you.

Mr. UPTON. I thank the gentleman from Virginia. For a little while I thought I was listening to that Fed Ex commercial the way that you went through that statement in quick order.

I look forward to working with all members of the subcommittee. This legislation may, in fact, change based on the hearing today, in terms of stronger penalties, a number of things that are certainly open to me. But I look forward to listening to the testimony, interacting with the witnesses, and working with both sides of the aisle to have a better—even a better proposal.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you, Mr. Chairman, for convening this legislative hearing today on your bill, H.R. 1765.

As many have done already, I commend the intent of this legislation.

For too long we've heard the complaints from various common carriers regarding competitive violations of the Telecommunications Act of 1996.

Recently we heard from newly installed Federal Communications Commission Chairman Michael Powell regarding his desire to levy greater fines and receive greater enforcement tools to better enable his agency to combat these anti-competitive violations.

As usual, this committee is quick to act. Unfortunately, in our haste to legislate a solution, as is usually the case, we've ignored some important provisions that make sense and hopefully will find their way into the final product.

Mr. Chairman, beyond the fact that I'd like to see this bill enacted into law as a stand alone bill and not part of a larger package, I'd also like to see some consideration given to small and mid-size carriers be they incumbent local exchange carriers (ILECs) or competitive local exchange carriers (CLECs).

A tiered system of fines or possibly a percentage of yearly revenue would make sense instead of a fixed amount geared mainly toward those large companies that seem to get the most attention.

I think most would agree that it is absurd to force small businesses like RT Communications, Dubois Telephone, WyoCom or SilverStar operating in rural Wyoming that may only have a few hundred or a few thousand access lines to be lumped together with Qwest or AT&T in this regard.

I would like to work with you, Chairman Upton, and with the Chairman of the Energy and Commerce Committee to craft a solution to this all too prevalent problem: treating small and mid-size companies the same way as we treat the telecommunications giants.

Again, thank you for holding this hearing and I yield back the balance of my time.

Mr. UPTON. This concludes the opening statements by members. Our panel today includes Mr. Albert Halprin, partner of Halprin, Temple, Goodman and Maher; Mr. Royce Holland, Chairman and CEO of Allegiance Telecom; The Honorable Leon Jacobs, Chairman of the Florida Public Service Commission; Mr. Lawrence Sarjeant, Vice President, Regulatory Affairs, from the U.S. Telecom Association; and Mr. David Solomon, Chief of the Enforcement Bureau of the FCC.

As many of you heard, the buzzers have sounded. We have a vote on the House floor. We are going to take a brief recess and come back to Mr. Halprin's testimony at about 11:25.

[Brief recess.]

Mr. UPTON. More members are coming back.

I also note that there are a number of subcommittees that are meeting all at the same time. And we do have a full committee markup early this afternoon, and there are a couple more votes expected on the House floor before we get there.

So, Mr. Halprin, welcome. We have the 5-minute clock up here. If you can—all of your statements are made part of the record in their entirety. And if you could limit your remarks to 5 minutes, that would be terrific.

Mr. Halprin?

STATEMENTS OF ALBERT HALPRIN, PARTNER, HALPRIN, TEMPLE, GOODMAN, AND MAHER; ROYCE J. HOLLAND, CHAIRMAN AND CEO, ALLEGIANCE TELECOM, INC.; HON. LEON JACOBS, CHAIRMAN, FLORIDA PUBLIC SERVICE COMMISSION; LAWRENCE F. SARJEANT, VICE PRESIDENT, REGULATORY AFFAIRS, U.S. TELECOM ASSOCIATION; AND DAVID H. SOLOMON, CHIEF, ENFORCEMENT BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Mr. HALPRIN. Thank you very much, Mr. Chairman, members of the subcommittee. I very much appreciate the invitation. It is a pleasure to appear before you and with this distinguished panel.

The proposals in H.R. 1765 to revise the enforcement penalties available to the FCC constitute a commendable and necessary first step toward safeguarding the pro-competitive mandates of the Act. Congress, however, should also take this opportunity to enhance consumer protection for residential and small business customers.

As the FCC continues to eliminate traditional regulation of competitive markets and services, including eliminating all prior review of rates and practices, it is more important than ever that the Act provide deterrence from unlawful conduct which may escape regulatory notice or action for years.

Because Congress is probably quite unlikely to engage in multiple amendments of the Communications Act to address various different types of carrier violations, I would hope the subcommittee could now consider a broader approach to enhanced enforcement which would add three additional mechanisms in addition to those contained in the bill not currently included in the language.

First, the FCC should have the right and ability to delegate consumer protection authority over interstate rates and services involving residential and small business customers to State regulators who are better suited to determine whether such rates and terms of service are just and reasonable and to monitor and enforce remedial action.

Second, the FCC and the States under delegation should have the ability to levy penalties on wilful violators that are equal to the amount a carrier wrongfully or excessively received as a result of their violation, plus an added penalty factor.

And, third, the Commission and the States under delegation should be able to handle class complaints brought by consumers and small businesses who have been victimized through a pattern of rule violations by a carrier.

Placing these arrows in the quivers of Federal and State regulators, in addition to the stepped up penalties that the chairman has proposed, would increase the ability of regulators to protect those small customers.

The need to protect those customers has become all the more acute in an era when Congress and the FCC have properly deregulated most of the telecommunications industry. Detailed regulation, while appropriate in markets still in transition to competition, reduces competition and harms consumers in geographic or service markets which are meaningfully competitive.

The FCC should, of course, continue to extend its deregulatory approach, as should Congress, to all competitive markets and services. But as it implements these policies, it no longer reviews in advance the rates or practices employed in virtually all cases involving long distance carriers and competitive local carriers.

Now, policymakers are correct to eliminate these advance obligations and rules in order to allow the market to work properly. However, this kind of deregulation must be coupled with adequate provisions and enforcement tools to ensure that when abusive behavior exists it is brought to regulators' attention and stopped.

Regulators must then be able to come down hard on carriers that seek to take advantage of a free market environment to engage in anti-consumer or anti-competitive practices. Deregulation without adequate enforcement or monitoring of the parts of the marketplace where competition has not extended or has broken down amounts to advocating responsibility to protect consumers.

Laudably, through the legislative process, this subcommittee is addressing its responsibility to protect customers and competition. However, in my judgment, even the enhanced penalties in H.R. 1765 will not be a sufficient deterrent to an unscrupulous or a desperate carrier that recognizes it can still make substantial sums through excessive charges or unlawful practices, even if it pays the maximum fine.

I am not, of course, suggesting reregulation of the widely advertised prices with which various carriers try to attract willing customers, and that constitutes the very large majority of offerings. Your competition has and will continue to discipline the market and protect and serve customers. Rather, I am addressing the limited areas of market failure, particularly those that involve a lack of consumer knowledge of or consent to a rate or practice.

While limited, however, these can and have involved millions of customers and hundreds of millions of dollars. It is plain to me that State officials are aware of the magnitude of enforcement problems. They are concerned about fractured responsibility to confront anti-consumer activities, particularly involving residential and small business customers.

I am certain that they would be delighted to work with this subcommittee and the FCC to develop new mechanisms to address this, and I would add in my last 8 seconds that this would have the salutary effect of freeing up existing resources without new money at the FCC to address competitive matters.

Thank you, Mr. Chairman.

[The prepared statement of Albert Halprin follows:]

PREPARED STATEMENT OF ALBERT HALPRIN, PARTNER, HALPRIN, TEMPLE, GOODMAN & MAHER

Introduction

The Federal Communications Commission ("FCC") plays a crucial role in implementing Congress' mandate, through the Telecommunications Act, to introduce competition, protect consumers, and ensure universal service. However, it is becoming increasingly evident that the Commission cannot do so without enhanced abilities to enforce laws and regulations by imposing adequate penalties upon violators and granting adequate relief to consumers, particularly residential and small business consumers. It also appears that the protection of these small consumers can be improved by involving the states as well. Through the proposals for stepped-up penalties in H.R. 1765, the Subcommittee has undertaken an excellent start in a process of bolstering the FCC's enforcement abilities. This process is necessary and highly desirable.

The FCC, under the leadership of Chairman Michael Powell, and Congress led by this Committee and Subcommittee are forging a path to greater welfare through competition for consumers large and small. Based on over 20 years in the field, including hands-on regulatory experience, I have no doubt that American consumers will be the beneficiaries of these actions enabling telecommunications carriers to fully and fairly compete. Competition, rather than the micromanagement of market entry terms via regulators' negotiations, will best serve American consumers. Therefore, rule number one is that competition, not pervasive regulation, best serves the public interest. Its necessary corollary, discussed here today, is that unlawful acts by competitors must be deterred by effective, well understood enforcement mechanisms.

Because Congress is unlikely to engage in multiple amendments of the Communications Act to address various types of carrier violations, the Subcommittee should now consider a broader approach to enhanced enforcement, which would add three additional mechanisms not currently included in the language of H.R. 1765. There are three different categories of violations that currently test the FCC's enforcement capabilities: (1) those that harm competitors; (2) those that harm major customers, such as large corporations and institutions; and (3) those that hurt residential and/or small business customers. It is the last category that is addressed the least by current procedures. Protecting residential and small business customers must be of at least equal concern to Congress and the FCC at this juncture as the protection of competitors. Residential and small business customers, who are the backbone of the U.S. economy, are the most vulnerable to anti-consumer practices, and they have the least ability to defend themselves when they are victimized by rule violations.

This is particularly true in our era of deregulation (which I wholeheartedly support), when Congress and the FCC are properly reducing or eliminating prior review

of carriers' rates and practices as markets grow more competitive. In line with the policy of Congress and the FCC, deregulation must be coupled with adequate enforcement for those limited areas where competition itself cannot adequately protect customers. This is particularly necessary to protect residential consumers and small businesses from violators seeking to take advantage of relaxed market regulation.

Three legislative enhancements are necessary to boost enforcement:

- The FCC should have the right and ability to delegate consumer protection authority over interstate rates and services involving residential and small business customers to state regulators, who are better suited to determine whether such rates and terms of service are "just and reasonable" and to monitor and enforce remedial actions.
- The FCC (and the states under delegation) should have the ability to levy penalties on willful violators that are equal or equivalent to the value or amount a carrier wrongfully or excessively received as a result of the violation, plus an added penalty factor (perhaps 25 percent).
- The Commission (and the states, under delegation) should be able to handle "class" complaints brought by consumers and small businesses that have been victimized through a pattern of rule violations by a carrier.

Placing these arrows in the quivers of federal and state regulators—in addition to the stepped-up penalties already contemplated in H.R. 1765—would increase the ability of regulators to protect all consumers as well as competitors in the rapidly changing environment of growing market-based competition.

The Proposed Legislation Is Necessary and Desirable

This Subcommittee is to be commended and encouraged in turning its attention to the issue of whether the FCC currently has the proper and sufficient enforcement tools to protect the interests of consumers and business owners in the United States. With the proposals in H.R. 1765 to increase penalties for violation of common carrier laws and regulations, this Subcommittee is making an excellent start in a timely effort to update and give teeth to the FCC's enforcement capabilities. Such an enhancement is both clearly necessary and highly desirable at this time, as the FCC works to implement the pro-competitive provisions of the Telecommunications Act of 1996.

There is no question that the FCC must have the ability to levy meaningful penalties when common carriers violate the laws, rules, and orders that have been put in place to ensure that consumers and businesses receive high-quality telecommunications services and enjoy the full fruits of Congress' actions to introduce competition. The monetary caps on penalties contained in the Communications Act, while, perhaps, at one time sobering and strict, are inadequate to provide sufficient deterrence in today's era, when rule violators stand to gain either an improper competitive advantage or windfall profits as a result of their actions. If Congressional intent is to be realized through complete implementation of the Telecommunications Act, companies that violate the nation's laws concerning competition and consumer protection must be punished in a meaningful way. Even more important is deterring such conduct in the first instance. Put simply, the limits on fines and forfeitures that the FCC can impose under current law are out of date and certainly need to be revamped to provide any meaningful deterrence.

Moreover, the Commission has all too often applied pressure or threats of penalties in an informal manner rather than through explicit enforcement processes. This has bred an atmosphere in which the FCC has conducted long, burdensome proceedings, during which it has used its limited authority to review license transfers and other functions as a pretext to engage in informal "enforcement" relating to actual or potential future anti-competitive conduct. The result frequently has been detailed, private-channel negotiations between the FCC and carriers, in which the Commission tries to achieve policy goals that may have little to do with the narrow purpose of its review in the first place. Nowhere has this become more prevalent than during the FCC's public interest reviews of mergers and acquisitions. Providing adequate enforcement tools will help in narrowly defining the Commission's role in overseeing such transactions which, as Chairman Powell has rightly made clear, are not, and should not be, substitutes for rulemaking or enforcement actions. Providing the FCC with sufficient explicit tools to enforce Congress' pro-competitive and pro-consumer legislation would also help obviate the need or opportunity for the Commission to attempt to implement policy through informal threats, pressure and cajolery.

Congress is taking the right step, at this juncture, to address the FCC's need for strong enforcement tools that will be applied through a more transparent and effective process, rather than through unseen negotiations with carriers, conducted through merger reviews and other proceedings. Through legislation, Congress can

restore accountability and transparency, giving the public and the telecommunications industry more assurance that Congress' goals for competition, service quality and universal service will be met.

However, even these enhanced penalties—while appropriate for the still pervasively regulated activity of providing facilities and services to competitors and the essentially competitive business of providing service to the largest of business customers—are not sufficient to deter all improper conduct by deregulated carriers such as long distance and competitive local carriers. In the past, some of those carriers—well aware of the lack of interest or ability in enforcing the Communications Act against them—have virtually ignored residential and small business complaints. Every state commission and the FCC has heard the frequent voices of customers who cannot even get some carriers to listen to their complaints or who lack the ability to correct problems even after determining that they exist.

A Comprehensive Approach Is Needed

While the proposed legislation (H.R. 1765) marks a very good first step, it addresses only a portion of the current enforcement problems. Since it is highly unlikely and perhaps undesirable that Congress should continually revisit this issue through multiple and repeated amendments of the Communications Act, the Subcommittee should, at this time, address enforcement issues in a comprehensive manner. There are, in fact, three types of violations that can harm the public:

- **Violations that harm competitors**—These violations, through which primarily incumbent local exchange carriers aim to hamstring the ability of new market entrants (or existing competitors) to operate effectively, will certainly for some time be addressed through a combination of proscriptive rules and enhanced penalties, such as those proposed in H.R. 1765. A speedy and fair resolution of any and all complaints about such conduct—once again, as addressed by H.R. 1765—is the most important factor here.
- **Violations that harm major customers**—Such violations tend to be less frequent than the other two types, since these customers are better protected by the presence of competition itself. Large customers' own market power as buyers provides them with numerous choices of carriers and service packages and tends to police bad behavior by any single carrier or group of carriers. It is these customers who have certainly benefited the most from the detariffing ordered by the FCC, as authorized by the Telecommunications Act of 1996. The effects of competition and detariffing should be backed up through the formal complaint mechanism provided in the FCC's rules, bolstered by stiff, enhanced penalties for violations and the award of sufficient damages to justify filing a complaint.
- **Violations That Harm Residential and Small Business Customers**—Such customers are the most in need of protection from unjust and unlawful practices of carriers, because, as individuals, they lack any power whatsoever in the market and frequently have little recourse when confronted by clear violations of laws and regulations. Despite laudable efforts at the federal and state levels to increase protection and consumer education in recent years, many such customers have continued to be victimized by anti-consumer and anti-competitive practices, and many have little experience or knowledge of how to seek help and compensation. This is even more daunting since the resources necessary to prosecute a complaint are far in excess of any possible recovery under current rules. The need to protect residential and small business customers is the area where enhancement of existing enforcement tools is most clearly needed.

  Even the proposed enhanced penalties may not be sufficient deterrence to an unscrupulous or desperate carrier that recognizes it can make substantial sums through excessive charges or unlawful practices even if it pays the maximum fine. I am not addressing the widely advertised prices with which various carriers try to attract willing customers which constitute the very large majority of offerings. Here competition has, and will, continue to discipline the market and protect and serve customers. Rather, I am addressing limited areas of market failure, particularly those that involve a lack of consumer knowledge of, or consent to, a rate or practice. While "limited," however, these can involve millions of customers and hundreds of millions of dollars.

Enforcement in an Era of Deregulation

The need to protect consumers and small businesses in these areas where competition itself is insufficient has become all the more acute in an era when Congress and the FCC have properly deregulated most of the telecommunications industry. As it implements and promotes the pro-competitive policies mandated by Congress, the Commission has stopped the prior review of the rates and practices employed

in the market in almost all cases involving long distance and competitive local carriers. Moreover, certain carriers fought tooth-and-nail to prevent efforts by the FCC in recent years to implement mandatory detariffing, seeking to hide behind the protection afforded to them by the filed-rate doctrine, at the expense of all consumers. These carriers sought to protect their own legal and market positions, but in the process they avoided providing consumers full and fair rights of protection under the provisions of contract law. The final implementation of detariffing by the FCC pursuant to the Telecommunications Act of 1996, coupled with the changes which would be made by H.R. 1765, should mean that major telecommunications customers will be sufficiently protected.

Congress and the FCC are appropriately concerned about the potential for abuse that deregulation brings for some consumers. Deregulation starts by eliminating *ex ante* regulations that spell out in detail, in advance, all of the rules, reports, requirements and obligations that apply to carriers—and often prove to be a burden and barrier to free operation of the market. Detailed regulation, while appropriate in markets still in transition to competition, actually reduces competition and harms consumers in geographic or service markets which are meaningfully competitive. The FCC should continue to extend a deregulatory approach to all competitive markets and services.

With the growth of competition, policy-makers are correct to reduce these *ex ante* obligations and rules in order to allow the market to work properly. However, this kind of deregulation must be coupled with adequate *ex post* provisions—enforcement tools—which ensure that, where abusive behavior exists, it is brought to regulators' attention. Regulators must then be able to come down hard on carriers that seek to take advantage of a free-market environment to engage in anti-competitive or anti-consumer practices. Deregulation without adequate enforcement or monitoring of the parts of the marketplace where competition has not extended or has broken down may amount to simply abdicating responsibility to protect consumers. Laudably, through the legislative process, the Subcommittee is addressing its responsibility to protect customers and competition, and it is seeking to shore up the FCC's ability to live up to its enforcement responsibilities, as well.

In my judgment, three enhancements are needed to bolster the FCC's ability to protect consumers and small business customers. Those are the following:

- **Right of Delegation to the States**—This is perhaps the most important change involving residential consumers which Congress could make at this time. The FCC is not, and never has been, well equipped to decide whether particular rates for residential or small business customers—or the practices that go with those rates—are "just and reasonable," or, in many cases, to even be actively aware of what those rates and practices are. State regulatory commissions, which are much more attuned to activities in their own jurisdictions, are much better equipped to investigate and act in those instances, and to adopt procedures which will give residential and small business customers meaningful access to the complaint process. The FCC should have the right (and, perhaps eventually, even the obligation) to delegate to state regulatory commissions its authority to review complaints involving rates charged to residential and small business customers for interstate services, including local carrier rates such as surcharges and interexchange (long distance) rates, as well as practices involving these rates. The FCC should have this delegation authority either on a permanent basis or, if need be, on a trial basis, to determine the effect that any such delegation would have on the regulation of interstate rates. The FCC could also retain some form of appellate review—on a fast track basis—of findings of violations.
- **Meaningful Penalties**—Where the economic benefits of trying to "sneak" a violation past regulators may, in fact, result in a gain of hundreds of millions—or even billions—of dollars to a violator, a fine of $10 million or $20 million can hardly be a significant deterrent. In the case of such a mammoth violation, it may be a useless exercise to try to estimate or set, in advance, a monetary figure to use as a cap on penalties. Clearly, for certain companies, the benefits of engaging in a massive violation—even if caught red-handed—can exceed the costs of even the maximum penalties, making the ultimate pay-off well worth the risk. A better structure for assessing penalties in the case of willful consumer fraud would be to fine the company an amount equal or equivalent to the value or amount received by the company as a result of its illegal action, plus a penalty factor (perhaps 25 percent).
- **Class Complaints**—The FCC (and state regulators, through delegation) must have the ability to deal with "class" complaints brought by groups of affected consumers or small businesses that have been victimized by rule violations or anti-competitive practices. Violators should not have the ability to divide and

conquer, isolating small businesses and residential customers and defeating their complaints one by one. Virtually no individual will invest the money or resources in pursuing a complaint for an amount which is a tiny fraction of the cost. Millions of such violations add up to huge sums of money, however. Therefore, where there is a pattern of anti-competitive practices affecting significant numbers of end users, consumers should have the ability to unite in opposing the practices that have harmed each of them. While the U.S. District Courts currently may hear class action complaints, a regulatory rather than a judicial solution is preferable. The nation's communications expert agencies should be empowered to protect consumers and small businesses.

State Regulators' Role

Recent informal discussions with state commissioners and officials of the National Association of Regulatory Utility Commissioners ("NARUC") have made it plain to me that state officials are aware of the magnitude of enforcement problems facing federal and state governments. Moreover, they are concerned about fractured responsibility to confront anti-competitive and anti-consumer activities in the industry. I believe that officials at NARUC and in many state regulatory commissions would be willing—indeed, eager—to work with the FCC in order to step up the level of consumer protection and to implement legislation designed to replenish regulators' enforcement toolboxes. As I have stated, state regulators have a role to play and are perhaps the best suited, where residential and small business customers are concerned, to apply enforcement policies. And there is undoubtedly a federal interest in crafting and applying a sensible approach to ex post enforcement actions nationally. Only through coordination between federal and state jurisdictions can the expertise and capabilities found on both levels be brought to bear both efficiently and effectively.

In closing, this Subcommittee and its Chairman should be lauded for introducing and considering legislation to step up enforcement powers in the era of developing competition and substantial deregulation. The Subcommittee should ensure that it approaches this task in a comprehensive manner at this point in time, since the chances to revisit enforcement issues in the future may well be few and far between. I would be delighted to respond to any request by the Subcommittee and its staff to work on the language of legislation that would provide such a comprehensive boost to common carrier consumer protections. Thank you for your gracious invitation to speak before the Subcommittee today on this issue.

Mr. UPTON. Thank you.

Mr. Holland?

STATEMENT OF ROYCE J. HOLLAND

Mr. HOLLAND. Thank you, Mr. Chairman, for inviting me to testify on this very important matter involving the FCC's enforcement.

I am the Chairman and Chief Executive Officer of Allegiance Telecom. We are headquartered in Dallas, Texas, and we are a facilities-based competitive local exchange carrier that provides a wide array of voice and data services to the medium and small business sector.

In my prior life I was Chairman of MFS Communications Company, which was one of the early stage competitive access providers in the pre-Telecom Act era.

First, let me start by saying that I believe the Telecommunications Act of 1996 is one of the most significant pieces of commercial legislation enacted by Congress in the last 30 years, but stricter enforcement of this landmark legislation is truly needed if we are going to have a truly competitive marketplace for medium and small businesses and residential customers.

Unfortunately, we have often found that when the incumbent is found liable for violations the punishment given is not severe enough to deter such behavior. In a hockey parlance, they get sent

to the penalty box for 2 minutes. We need to see game misconducts and ten-game suspensions, the equivalent of, to get it done.

I am really encouraged by what Chairman Powell has been doing at the FCC. I know he has gotten some bad press. It is totally unjustified. I was tremendously encouraged by his recent statement that when companies break the law he will hurt them and he will hurt them bad. But he also went on to say that he has inadequate tools to get that done.

I applaud our new Chairman of the FCC for doing all he can with what he has, but what he needs is a much bigger stick to really get the job done in the right way.

First, let me give you a few examples of the anti-competitive conduct that we are dealing with on a day-to-day basis in the marketplace, and I will use Exhibit A, Verizon, the largest provider of local wireline telephone services in the country.

No. 1, Verizon has consistently overcharged us for a variety of tariff services and then drags their feet and resists and refuses to reimburse us for those overcharges.

No. 2, Verizon has withheld payment on a consistent basis pursuant to our interconnection agreements and tariffs.

And, No. 3, Verizon has consistently used our own order information for cutting over a customer to our network to block those prospective customers from switching to Allegiance. This constitutes illegal self-dealing between our supplier and our competitor, who are both owned by the same company I might add.

In addition, I think it is important for the members to understand that the success of competition in the small business and residential market is not solely threatened by the ILECs. AT&T, the original Ma Bell, has done more than its fair share to try to strangle the competition by unilaterally refusing to pay CLECs for the use of their networks to originate and terminate its long distance traffic.

AT&T's predatory conduct is just as harmful to CLECs as its offspring. I would say that the rotten fruit all falls from the same dominant carrier tree when you get right down to it.

Now, I am a businessman, and many of these problems boil down to the fact that I don't have the desire, the time, or the resources to file lawsuit after lawsuit to just get deadbeats to pay their bills.

Now that I have laid out some of the problems, I would like to highlight a few recommendations that I have for the committee to consider. I will just hit these briefly, because they are discussed in more detail in my written testimony.

One, don't limit the FCC's forfeiture authority to $10 million, $10 million doesn't get it done with a company like Verizon that has $15 billion in quarterly revenue. Something more like 1 percent of revenue would be a more adequate measure. That is very consistent with what is done with the universal service fund.

No. 2, is authorize the FCC to hire 25 special masters to adjudicate carrier-to-carrier disputes on an expedited basis, much the way that the Cannon-Conyers bill on the ADR processes limit the amount of lawsuits that can be done on that, kind of like major league baseball.

No. 3, adopt measures to deal with the deadbeat dad syndrome, which seems to plague AT&T and its offspring, and there are other measures.

Just in conclusion—I know my staff wrote this. They didn't realize my Texas accent moved a little slower. So let me just conclude by saying that I feel compelled to respectfully address the neutron bomb that is really lurking in the back of the room, and that is the Tauzin-Dingell measure reported by this committee last week, which will essentially reestablish the local loop bottleneck and preclude competition in most of the small- and medium-sized business markets and the mass market.

Now, these bills should be joined. I think that would be a real problem, because I do need to qualify my testimony by basically saying that you could invoke everything I have suggested today, and you could even hire Judge Roy Dean, the hanging judge, and the famous law west of the Pecos, as the FCC's Enforcement Bureau Chief—no disrespect to Mr. Solomon—but I still couldn't support this bill if H.R. 1542 were also enacted because, as Congressman Pickering pointed out, it would be a whole lot less to enforce because competition SME and residential markets would be bad.

Let me just conclude by saying I have been somewhat of an outlier in that I am one of those rare people that have actually supported a couple of 271 applications by Verizon and withdrew opposition to one by SBC. I am not trying to keep them out of long distance. I know the 271 process can work. I have seen it work. It gives the ILECs everything they need.

Also, the FCC has all the authority it needs in the Telecom Act to forbear from regulation when market conditions warrant. So I would say that we do not need other incentives for these companies. They don't need to cheat, and they don't need a government handout. Instead, I ask you respectfully to give Chairman Powell the enforcement tools he needs to make competition work for all Americans, not just for the Fortune 1000.

[The prepared statement of Royce J. Holland follows:]

PREPARED STATEMENT OF ROYCE J. HOLLAND, CHAIRMAN AND CEO, ALLEGIANCE TELECOM, INC.

Mr. Chairman and Members of the Subcommittee, I am Royce J. Holland, Chairman and Chief Executive Officer of Allegiance Telecom, Inc. Allegiance is a facilities-based, competitive local exchange carrier (CLEC) headquartered in Dallas, Texas that offers the small and medium sized enterprise (SME) market a complete package of telecommunications services, including local, long distance, international calling, high-speed data transmission and advanced Internet services including high speed dedicated access, web hosting, virtual corporate intranets, and an E-commerce platform. I appreciate this opportunity to testify before the Subcommittee on H.R. 1765. I wish to address one of the most daunting challenges affecting my industry: effective enforcement of Congress' mandate to open telecommunications markets to competition.

Before I do so, let me provide the Subcommittee with some background about Allegiance. Since its founding in 1997, Allegiance has expanded its operations to serve 31 markets across the country with almost 4,000 employees. We had revenues of $285 million in 2000, an increase of 188% over the prior year. Allegiance has designed our networks using a "smart" build approach. We use a combination of our own network facilities, unbundled network elements leased from the incumbent telephone companies and, where it is available, fiber leased from third parties to provide service to small and medium sized businesses. To date we have installed more than 730,000 lines, approximately 90% of which are "on switch." We have collocated in 636 incumbent local exchange carrier central offices across the nation, and when we add five more markets this year to complete execution of our current fully-fund-

ed 36 market business plan, we will be addressing 57% of the total addressable U.S. business communications market.

Prior to co-founding Allegiance, I was President and co-founder of MFS Communications Co., one of the pioneers in the competitive local telephone industry even before the passage of the Telecommunications Act of 1996. MFS grew from a privately held start-up operation to one of the Nasdaq 100 Index companies serving 52 markets in North America, Europe and Asia, with annual revenue of about $1 billion. MFS was purchased by WorldCom in 1996.

The Telecommunications Act of 1996 was landmark legislation that offered consumers the promise of a choice of local telephone service providers for the first time in any of our lifetimes. No one expected that competitors would find it easy trying to break the monopoly strongholds controlled by the Regional Bell Operating Companies (RBOCs) and GTE. Nonetheless, five years after you so astutely determined that developments in technology and the public interest demanded that the government sanctioned protection for local telephone monopolies should be lifted, competitors have been able to capture a mere 8% of local telephone lines. At the same time, the RBOCs and GTE have joined forces to increase their size and domination of the nation's local telephone market, with the former Bell Atlantic acquiring New York Telephone, New England Telephone and GTE to become the behemoth Verizon and Southwestern Bell acquiring Pacific Telephone, Nevada Telephone and Ameritech. While Congress concluded that it would only be fair to open the long distance market to the RBOCs once they had opened their local markets to competitors and for that reason overrode the MFJ and Judge Harold Greene's oversight of the RBOCs, an unfortunate by-product of life without the MFJ and Judge Greene has been the concentration of control of the nation's local telephone market in the hands of 4 megamonopolies, rather than the 8 that dominated the market in 1996. What this means for CLECs is that the Goliaths they must battle for both customers and network access have grown bigger, more powerful and more cocky about using their market power to keep their competitors at bay.

Take Verizon as an example. According to its Year 2000 Annual Report, the Verizon companies are the largest providers of wireline communications in the United States with nearly 109 million access lines in 67 of the top 100 US markets and 9 of the top 10. Verizon serves one-third of the nation's households, more than one-third of Fortune 500 company headquarters and the Federal Government. Verizon has proudly trumpeted to Wall Street that it lost 29% fewer lines to competitors in the second half of 2000 than it did in the first half of the year. Statistics like these demonstrate that further deregulation of the RBOCs is not appropriate, and indeed would be extremely detrimental to the struggling competitive industry, at this time. The increase in concentration of control of the nation's local access lines since the passage of the 1996 Act means that more, not less, regulatory enforcement is needed if the pro-competitive goals of the Act are to be realized.

In order to provide service to customers, CLECs need access to the networks and facilities of the incumbents, especially to the unbundled loops connecting customers to the network (also known as the last mile) and colocation space in the incumbents' central offices. In passing the Act, Congress recognized that competitors could not duplicate the ubiquitous facilities of the incumbents overnight and indeed that in most instances, the last mile could never be duplicated for the SME and residential mass markets. Sections 251 and 252 provide CLECs with access to the interconnection, unbundled network elements, colocation and wholesale pricing that we need to get into the local telephone market, but the rights afforded by the Act are ephemeral unless they can be expeditiously enforced without expensive and drawn out litigation. Although CLECs are big customers of the RBOCs as purchasers of interconnection trunks, colocation and UNEs, CLECs use those tools to compete for the same end users as the RBOCs. This inherent conflict between their roles as suppliers and competitors significantly diminishes the incentive the RBOCs have to open their markets. Even the carrot of Section 271 has not proven sufficient to compel strict compliance with the market opening provisions of the Act as evidenced by the fact that the RBOCs have filed for Section 271 relief in so few states.

To help ensure that local telephone competition becomes a reality for all American consumers, Congress must give the FCC the resources to implement a regulatory scheme that has certainty and an enforcement program that has teeth. I appreciate this opportunity to make some suggestions about improving enforcement of the Act.

CLARIFY THE FCC'S AUTHORITY TO ENFORCE SECTION 251

A shortcoming of lax enforcement has been a perception by some of the ILECs that compliance with Section 251 of the Act is somehow voluntary and only to be achieved in order to receive Section 271 authority to enter the inter-LATA market.

Congress should make clear that the FCC has authority pursuant to Section 251 of the Act to resolve inter-carrier disputes and enforce interconnection agreements, statements of generally available terms and state tariff provisions that codify the RBOCs' obligations to provide interconnection, UNEs and colocation. While many state commissions have been vigilant in resolving interconnection disputes, the decisions have no precedential value outside of the state where the dispute was brought and the RBOCs often take the position that the decisions are applicable only to the parties to the dispute. For example, over the past several years, the Texas PUC has issued several decisions directing SBC to pay reciprocal compensation to CLECs. Despite these decisions, Verizon continued to resist its obligation to pay reciprocal compensation arguing that the PUC's rulings applied only to SBC. Even after the PUC issued a decision last fall specifically holding that Verizon was subject to the same reciprocal compensation obligations as SBC, Verizon has continued to withhold full payment of amounts owed to Allegiance on the grounds that the decision applies only to the CLEC that brought the action.

Reinforcing the FCC's authority to enforce compliance with section 251 and to decide interconnection disputes would allow for the development of precedent that has nationwide applicability and would relieve CLECs of the financial burden of bringing multiple complaints against every RBOC in every state in which they operate. The substantial financial resources that are currently being diverted to litigating interconnection rights on a state by state basis could be far better spent by the CLECs on developing and expanding their networks.

PROVIDE THE FCC WITH ADDITIONAL RESOURCES TO ADJUDICATE COMPLAINTS

The FCC has devoted enormous time and energy to promulgating rules to implement the market opening provisions of the Act. The FCC needs additional resources, however, to fund the staffing necessary to enforce those rules. The threat of enforcement must be constant enough and the penalties for noncompliance must be high enough to effectively deter anticompetitive behavior. Congress should appropriate sufficient funds to enable the FCC to double the size of the Market Disputes Resolution Division of the Enforcement Bureau and to hire 25 special masters with relevant legal and industry experience to hear and adjudicate complaints between incumbents and competing carriers.

PROVIDE THE FCC WITH AUTHORITY TO REQUIRE PAYMENT PENDING THE RESOLUTION OF BILLING DISPUTES AND TO AWARD PUNITIVE DAMAGES

One very effective method RBOCs have employed to harm their competitors is to withhold or delay payments of amounts owed and to resist or delay providing credit for amounts overcharged under interconnection agreements or tariffs. Allegiance has faced this situation time and time again with Verizon. For example:

- Allegiance has been attempting for months to resolve a billing dispute with Verizon East relating to the jurisdiction of local and intra-LATA toll calls and to secure the payment to which it is entitled. Allegiance has complied with Verizon's every request to provide call detail records and other information and has repeatedly requested meetings to respond to any questions Verizon may have about the manner in which Allegiance jurisdictionalizes minutes. Last week, Verizon informed Allegiance that it disagreed with the methodology Allegiance used to jurisdictionalize 287 out of the 124,000 minutes of use being analyzed (i.e., less than 0.25%) and for this reason would not make any payment pending further study.
- Since 1999, Verizon Texas has withheld payment of close to $4.5 million in reciprocal compensation owed to Allegiance. Allegiance has provided full call detail records to Verizon to support its bills, but Verizon continues to withhold payment. Verizon's most recent contention is that it cannot complete its analysis until Allegiance supplies the street addresses of all of its end users.
- Last year, Allegiance discovered that Verizon New York was overcharging us approximately $38,000 per month for a tariffed billing platform service. After months of discussion, Verizon finally acknowledged its error and made partial reimbursement in December. To this day, however, Verizon still has not corrected its billing systems and continues to overcharge Allegiance for the billing platform service.
- A recent audit of the colocation bills Allegiance receives from Verizon revealed that Verizon has overcharged us over $3 million for DC power that we did not order. Despite escalation of this issue to senior management, Verizon has made no commitment to reimburse or credit Allegiance for the overcharges.

CLECs do not have the luxury of withholding payment as an offset to amounts owed or delaying payment to the RBOCs because the consequence of doing so is

being cut off and denied access to the essential facilities we need to provide service to our customers.

It is not only the RBOCs that have resorted to self-help to withhold payment to CLECs. CLECs all across the country have been forced to bring lawsuits against AT&T to collect payment of access charges for the use of their networks to originate and terminate the long distance calls of AT&T's customers. AT&T complained for years about the ILECs' access rates, but never withheld payment as it has done with the CLECs. The FCC repeatedly has ruled that carriers are not entitled to engage in self-help to withhold payment, but instead must pay amounts billed pursuant to tariff under protest and then bring an action to challenge the billings. Unfortunately, AT&T has ignored these rulings and continues to use the CLECs' networks to complete their customers' calls without payment, benefiting as it does from the delays involved as the complaint cases wend their way through the courts and the public utility commissions.

If the CLEC industry is to survive, CLECs must have access to a forum that can resolve payment disputes on an accelerated basis and that can provide relief while the actions are pending. Congress should give the FCC authority to hear complaints arising under interconnection agreements or tariffs on an expedited basis and provide relief in the nature of a "Deadbeat Dad" remedies. If one party to the dispute has failed to pay charges billed by the other party, the FCC should be given authority to require payment of the full amount billed within 30 days of the filing of the complaint unless the nonpaying party can show by clear and convincing evidence that the billing is fraudulent or otherwise invalid on its face. Such immediate relief is necessary to remove the benefits the RBOCs and AT&T currently realize by delaying payment and depriving CLECs of the revenues necessary to fund their operations.

The Commission should also be given authority to process all such complaints under the Accelerated Docket rules set forth in 47 C.F.R. Part 1 Subpart E. The FCC should be required to resolve disputes on the merits within 60 days of the filing of the complaints and should have the authority to grant all relief necessary to remedy violations of the agreement or tariff, including, but not limited to, injunctive relief, compensatory damages and punitive damages.

THE FCC SHOULD BE DIRECTED TO ADOPT PERFORMANCE STANDARDS AND REGULATIONS TO IMPLEMENT ITS 271 ENFORCEMENT AUTHORITY

The FCC should be directed to adopt a comprehensive set of self-enforcing performance standards governing the provision of interconnection and unbundled network elements. While the carrot of entry into the long distance market provides some incentive for the RBOCs to provision interconnection and unbundled network elements at an acceptable level of performance in the months immediately prior to the filing of their Section 271 applications with the FCC, the performance standards that they are required to meet vary state by state. In addition, the RBOCs have shown a proclivity to backslide once 271 relief has been granted and the carrot has been eaten. For example, in March 2000, just 3 months after it was granted authority to enter the long distance market in New York, the FCC found that Verizon had failed to meet its obligations under the Act to process orders from CLECs during the 2 months immediately following its 271 approval. Verizon had lost or mishandled orders submitted electronically by CLECs during January and February 2000, which seriously delayed the ability of CLECs to initiate service to their customers. In December 2000 and January 2001, Verizon was forced to pay a total of $7.3 million in penalties for failure to provide CLECs with the minimum level of service required by the New York Commission. Although $7.3 million seems like a lot of money, RBOCs often view such penalties simply as a cost of doing business. The penalties currently being assessed against incumbents have not proven sufficient in size to deter discriminatory and anticompetitive behavior as Allegiance can attest.

Verizon recently prevented Allegiance from processing orders for customers served by our New Rochelle, New York colocation facility for almost one month. We turned up the colocation in December of last year. On February 14, Verizon rejected Allegiance's orders for service that designated DSO pairs that Allegiance had installed in the New Rochelle colocation facility. Upon investigation, we learned that Verizon had moved 2600 Allegiance DSO pairs without warning or notification to alleviate congestion on its main distribution frame. Because Verizon had not updated its databases, its technicians were unable to find the new location of Allegiance's DSO pairs and claimed that they could not process our customer orders for that reason. On February 15, Verizon informed us that it had a frame to frame connectivity problem that prevented Allegiance's DSO pairs from being loaded into its databases.

On February 20, Verizon informed us that our DSO pairs had been moved again—this time to an area of the central office where there was an ongoing union dispute prohibiting technicians from doing the wiring necessary to process Allegiance's customer orders. It was not until March 12, after daily calls and escalation of the issue to Verizon management, that Verizon finally moved the pairs to another location and rebuilt its databases so that Allegiance's orders could be filled. In the meantime, Allegiance was unable to initiate service to its customers.

Allegiance currently has 80 orders for unbundled loops pending with Verizon in New York and Massachusetts for which it has been unable to obtain firm order commitment or installation dates from Verizon. Some of the orders for these loops were submitted as long ago as February and March. Verizon's delays in providing access to Allegiance mean that Allegiance cannot provide service to its customers on a timely basis. It is worth emphasizing again that New York and Massachusetts are the two states in which Verizon has been granted Section 271 authority to offer long distance service.

CLECs cannot succeed in the marketplace unless they can offer their customers a level of service comparable to what those customers can get from the RBOCs. National self-enforcing performance standards would create an invaluable tool for monitoring RBOC compliance with their obligations under the Act and detecting incidences of discriminatory behavior. The FCC should be directed to adopt minimum performance benchmarks which RBOCs must meet in providing service to their CLEC customers with automatic monetary penalties to be paid to CLECs when the RBOCs' performance falls below the benchmarks. To monitor compliance, the FCC should require the RBOCs to publish monthly performance statistics on a state-by-state basis for installation and maintenance of interconnection trunks, UNEs and any other services CLECS purchase. The performance reports should compare the intervals within which the RBOCs actually install and repair similar facilities for themselves, their retail customers and their affiliates and the intervals within which they provide such services for CLECs. The reports should also compare the frequency and duration of service outages suffered by the RBOCs' retail customers and those suffered by CLECs. If, over a 12 month period, the reports reveal a deterioration in service quality in any state in which they operate, the RBOCs should be required to show cause why their rates for interconnection and UNEs should not be reduced on a going forward basis by an amount proportionate to the deterioration in service quality.

In addition, the FCC should be directed to adopt rules that require RBOCs to provide automatic discounts on interconnection trunks, UNEs and special access services in any state where the actual installation and repair services they provide to CLECs are inferior to the services they provide to their retail customers and themselves. A sliding scale of discounts should be established based on frequency and extent of delays. For delays in installation of new services, the discounts would be applied to non-recurring charges. The RBOCs should not be permitted to assess any non-recurring charges for installation if service is not installed within the retail installation interval. For delays in repairing services, the discounts would apply to monthly recurring charges for the affected facilities. Self-enforcing penalties are imperative both because they will provide the right incentive for RBOCs to improve their performance and because CLECs receiving poor performance should not be required to pay full price.

The FCC should also be directed to adopt rules to implement the enforcement authority granted in Section 271(d) and to deter backsliding from compliance with the competitive checklist once the RBOCs are allowed into the long distance market. Such regulations should incorporate a range of penalties for violations of 271 and should include mandated rate reductions for wholesale services and network elements, suspension of 271 authority, the imposition of material fines and revocation of 271 authority.

INCREASE THE FCC'S STATUTORY FORFEITURE AUTHORITY

We appreciate Chairman Powell's recognition that CLECs have often "been stymied by practices of incumbent local exchange carriers that appear designed to slow the development of local competition" and applaud his request for increased forfeiture authority.[1] But more is necessary. H.R. 1765's cap of $10 million dollars should be removed altogether or increased significantly to the point where the fine would significantly impact the quarterly financial results of an RBOC or AT&T. The FCC should also be authorized to require that all or a portion of a forfeiture as-

[1] May 4, 2001 letter from Chairman Michael K. Powell to the Members of the House and Senate Commerce and Appropriations Committees.

sessed for violations of the Act or the FCC's rules be paid to the carriers injured by the violations, rather than to the Treasury, in an amount sufficient to compensate them for the damages caused by the violations.

I also understand that H.R. 1765 contains a Cease and Desist provision, but I believe that provision is duplicative of the FCC's existing authority. The FCC has previously exercised its Cease and Desist authority in various slamming cases, in cases where cell towers violate height restrictions and also in the context of Qwest's illegal marketing of long distance services in-region.

We have had additional experiences that we believe warrant Cease and Desist action as well. The RBOCs have the ability to thwart CLECs' efforts to attract and retain customers in a myriad of ways other than poor provisioning of the facilities needed to provide service. It has come to Allegiance's attention that Verizon appears to be engaged in a systematic attempt to thwart Allegiance's sales efforts by, among other things, calling our prospective customers after we submit orders to Verizon to switch the customer's service to Allegiance and offering the customers a better deal if they cancel their orders with Allegiance. This is an example of where the FCC should exercise its existing Cease and Desist authority to prevent Verizon or any other RBOC from engaging in this predatory practice.

A few current examples will illustrate what I mean:

- We recently learned from a customer who cancelled his order with Allegiance before his service had been switched from Verizon that a Verizon representative called him shortly after he signed on with Allegiance and offered to match Allegiance's rates. Section 222(b) of the Act prohibits carriers that receive proprietary information from another carrier from using such information for their own marketing purposes. The only way Verizon could have learned of the customer's impending cancellation of service was through the order Allegiance submitted to Verizon to convert the customer's service. This was not an isolated incident. During the fourth quarter of 2000 and the first quarter of this year, more than 10% of the customers who had signed up for Allegiance service in New York and Massachusetts cancelled their orders before their service was converted from Verizon.
- We learned from another customer who called Verizon to lift his PIC freeze so that he could switch his service to Allegiance that the Verizon representative responded, "Are you sure you know what you are asking me to do? Let me fax you over a list of the problems Allegiance has caused and then you decide if you still want me to remove the freeze." The FCC has specifically determined that Section 222(b) prohibits a carrier executing a customer's request to change carriers from using such information to convince the customer not to make the switch. This has not stopped Verizon.

Competition is clearly harmed where an RBOC such as Verizon exploits the advance notice of a customer's impending cancellation of service that it receives in its position as the underlying network facilities provider to market its own services and win the customer back. Such conduct is clearly prohibited by the Act and I believe if the Enforcement Bureau would take a serious look at this situation, they would find it ripe for a Cease and Desist action. It is also not clear that carriers injured by such conduct have a private right of action for damages. To the extent that the FCC finds a carrier guilty of the misuse of carrier to carrier proprietary information and assesses a fine, it should be authorized to share a portion of that fine with the carrier injured by the violations.

Under the FCC's new slamming rules, carriers that receive allegations from customers that they have been slammed are required to notify the unauthorized carrier of the customers' allegations. All carriers are required to file a report with the FCC twice a year stating the number of slamming allegations made against them and whether the allegations were valid, as well as the number of slamming allegations they received against other carriers and the identity of those carriers. Since the notification rules have become effective, Allegiance has received a disproportionate number of slamming notifications from Verizon New York and Verizon New Jersey. For example, during the week of April 23-27, 2001, 66% of the slamming notifications Allegiance received were generated by Verizon New York and Verizon New Jersey. Almost every notification we have received from Verizon bears the fax line of the Verizon General Business Services Win Back Group. The Win Back Group apparently takes a very liberal approach to the definition of a slam as we have learned when we contact the customers to investigate the slamming allegations and discover that a substantial majority are unfounded. Verizon's Win Back Group seems to categorize any instance where a customer decides to return to Verizon as a slam no matter what the circumstances. We have received slamming notifications on customers who have reported to us that they never told Verizon they were

slammed. We received one slamming notification from Verizon on a former customer who had called Verizon to complain about its Verizon bill.

Allegiance takes slamming very seriously and immediately terminates any employee found to have engaged in slamming. Allegiance does not believe, however, that the FCC intended for carriers to classify any instance where a customer elects to go back to its former carrier as a slam. Verizon's apparent abuse of the FCC's slamming notification rules has caused Allegiance to devote considerable staff time and resources to investigating allegations that have no basis. We have no means to recoup these resources. Again, to the extent that the Commission could assess substantial fines against carriers for such abuses, and share a portion of those fines with the victimized CLECs, CLECs could be compensated for the damages they incur.

STATE ARBITRATION AND SAVINGS CLAUSE PROVISIONS OF H.R. 1765

The state arbitration provision of H.R. 1765 does not go far enough. It requires states to arbitrate interconnection disputes within 60 days. It may be helpful in some states to have a 60 day limit on decisions but in Texas, there are some proceedings that are dealt within a week. This is authority that states probably already have the discretion to exercise on their own. The language is also unclear as to whether the state decision is final and enforceable in state or federal court and sets no penalties for violating interconnection agreements. Further, the parties should be allowed to waive the deadline if it is mutually agreed upon.

The final section is a savings clause for service quality enforcement, but it appears to be undermined if H.R. 1542, the Tauzin-Dingell bill, were to become law. H.R. 1542 would strip away the service quality reports and with the defeat of the amendment offered by Congresswoman Eshoo these reports would disappear. It also appears this savings clause is limited to Section 252. Other provisions of H.R. 1542 limit the state's authority to enforce the interconnection agreements, by taking away the states' rights to regulate high-speed services. Since these provisions are in section 292, not section 252, they are unaffected by this savings clause.

CONGRESS SHOULD CONSIDER A REQUIREMENT FOR STRUCTURAL SEPARATION OF THE RBOCS

As I noted above, the RBOCs have the ability and the incentive to deny their competitors full, fair and nondiscriminatory access to their networks. If the increased penalties do not sufficiently alter their behavior then I would suggest the only plausible solution at the end of the day would be for Congress to require structural, or at least functional, separation of the RBOCs' retail and wholesale operations. If the retail side of an RBOC's company was forced to purchase service for their customers under the same terms and conditions that CLECs are, the wholesale division would have significantly stronger incentives to improve provisioning and performance standards.

CONCLUSION

The robust competition envisioned by the Telecommunications Act of 1996 has been painstakingly slow to develop on a broad scale in the SME and residential mass markets. I believe that this is due primarily to the following three reasons:

- Instead of invading each other's monopoly service territories and competing for each other's customers, the RBOCs have focused on combining their forces to form even larger monopolies and have devoted scant effort to complying with Sections 251 and 252 of the Act. The RBOCs have abused their dominant market power in many ways, including illegally withholding payments for exchange of traffic with CLECs.
- AT&T, which was expected to become a significant competitor to the RBOCs, has focused primarily on acquiring its own cable TV monopoly, and has eschewed significant deployment of local facilities except in the large corporate enterprise market. AT&T has also used its dominant position in the long distance market to favor the ILECs over new entrants in terms of paying its access bills, thereby causing significant financial harm to a number of CLECs.
- Despite good intentions, the FCC's enforcement authority, enforcement resources and cumbersome and bureaucratic processes are not geared to a dynamic competitive environment, and have facilitated the constant delays and violations of the Act by the RBOCs and AT&T.

The bottom line five years after passage of the Act is that (1) competitive choices are available to you if you are a large corporation; (2) far more often than not you remain at the whim of the local monopolist if you a small or medium-sized business;

and (3) most residential subscribers are still stuck with the same monopoly providers they had in 1996 for local phone and cable TV service. There is nothing that Congress can do to make the reluctant monopolists (the RBOCs and AT&T) compete with each other. However, Congress can significantly improve the opportunity for competition to develop in the SME and residential mass markets by arming the FCC with greatly increased enforcement powers. I urge you to strengthen the FCC's enforcement powers to help ensure that as the RBOCs and AT&T get bigger, the strides made by CLECs in providing consumers with competitive choices are not reversed. It is imperative that Congress make the penalties for noncompliance with the Act steep enough to serve as a deterrent as opposed to just a cost of doing business for the monopoly providers.

Mr. UPTON. Thank you.

Mr. Jacobs?

STATEMENT OF HON. LEON JACOBS

Mr. JACOBS. Good morning, Chairman Upton and members of the committee. As Congressman Stearns indicated, I am Chairman of the Florida Public Service Commission. But today I come primarily as Chairman of the Consumer Affairs Committee of the National Association of Regulatory Utility Commissioners, acronym NARUC.

I first want to thank you for the opportunity to come today. And along with you and co-sponsors, including Congressman Stearns, I applaud your foresight in promoting this measure.

It is an honor to be here and particularly the recognition implicit in your invitation of the critical role State commissions play in the transitions to a more competitive telecommunications market under the scheme Congress adopted in the 1996 legislation.

I come here to give you my preliminary thoughts on H.R. 1765 today. Because of the short time that has elapsed since the bill has been introduced, NARUC has not had an opportunity to form a consensus on this legislation. Similarly, the Florida Commission has not adopted a position.

However, given the collective experiences of NARUC member commissions, I can assure you that there is a need for ongoing enforcements in these markets. And I can assure you also that, in principle, NARUC would embrace public policy that further empowers both the States and the Federal Communications Commission to effectively address improper business practices.

In my opinion, the adoption of this bill is consistent with current collaborative enforcement efforts that are underway between the States and the FCC.

We continue to see progress in the State and national action plan group. This is a group that was formed in conjunction with the FCC, and it consists of staff from NARUC committees, and the FCC's enforcement and consumer information bureaus, and the National Regulatory Research Institute.

SNAP was formed with the mission of fostering a partnership between the FCC and State commissions to enhance consumer protection education, enforcement, and regulatory initiatives. Through SNAP, the FCC and States share the results of investigations and questionable business practices that may proliferate around the country.

Through these efforts, the FCC and the States have demonstrated their desire to work collaboratively, to be more attentive to the needs of consumers and the concerns of our congressional leaders.

As you are aware, NARUC has sent several letters opposing H.R. 1542, and I am not here to speak to that bill today, except to emphasize that the bill before us is a stand-alone bill, and, as you indicated, with some desire to deal with that later. I would encourage you and caution the committee to consider these enforcement measures separately and distinct from H.R. 1542.

Speaking as Chair of the Consumer Affairs Committee, I feel obligated to relate two points. First, NARUC has established a consensus position opposing any legislation that undermines the market-opening components of the Act. Second, in attaching a progressive measure such as those found in H.R. 1765, it would not diminish NARUC's concerns and opposition to the diminishment of those market-opening measures.

Therefore, as stand-alone legislation, I support the goal of increasing the penalties at the national level against companies found violating the FCC's rules and orders. Florida continues to receive complaints against companies that have already been fined or have settlements accepted by the FCC.

In addition, I might add we receive complaints over matters that we find difficult to enforce at times, and as part of the dialog I will give you input on that. It appears that under certain circumstances the current level of penalties is not adequate in removing the incentives to violate current law.

Chairman Powell's proposals for additional fines suggests that the FCC's current fining mechanisms are also inadequate.

Finally, I suggest to the sponsors that they consider clarifying that all penalties assessed on carriers are taken what we call below the line, and be excluded from customer rates. While I applaud also the sponsor's recognition of the need for States to arbitrate interconnection agreements, there is a brief concern. Many States are trying to expedite these complaint resolution proceedings, but they present very complex issues requiring very important insight into the actual data that is occurring at the State level.

A 60-day timeline would prove a bit tight. Currently, in Florida, we address complaints regarding interconnection agreements, and we have found that often issues involved in these cases are very complex. And in such cases substantial testimony and a full discovery process is vital.

Let me conclude simply by saying that in addition to the service quality measures that you place in it, we applaud those as well, and we support increasing the penalties at a national level, working together with the FCC to protect consumers from companies involved in deceptive business practices and having States resolve disputes in a timely manner.

Thank you.

[The prepared statement of Hon. Leon Jacobs follows:]

PREPARED STATEMENT OF HON. LEON JACOBS, CHAIRMAN, FLORIDA PUBLIC SERVICE ON BEHALF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Good morning. My name is Leon Jacobs, and I am here as the Chairman of the Consumer Affairs Committee of the National Association of Regulatory Utility Commissioners (NARUC). I am also the Chairman of the Florida Public Service Commission.

Chairman Upton, I'd like to begin by thanking you and the other subcommittee members for the invitation to speak to you today. It is both an honor and a privilege to be here. I also sincerely appreciate the recognition, implicit in the subcommittee's

invitation, of the critical role State commissions play in the transition to a more competitive telecommunications market under the scheme Congress adopted in the 1996 legislation.

I have come here today to give you my preliminary thoughts regarding H.R. 1765.

Because of the short time that has elapsed since the bill was introduced, NARUC has not had an opportunity to form a consensus view on this legislation. Similarly, the Florida Commission has not taken an official position on the bill. However, I can assure you that in principal, NARUC would embrace public policy that further empowers both the states and the Federal Communications Commission (FCC) to effectively address improper business practices.

PROPOSED INCREASE IN FCC FINING AUTHORITY

In my opinion, the adoption of this bill would not cause a deviation from the current collaborative enforcement efforts that are underway by the states and the FCC. We continue to see progress in the activities of the State and National Action Plan (SNAP) group, which is comprised of staff from the NARUC Staff Subcommittee on Consumer Affairs, the FCC's Enforcement and Consumer Information Bureaus, and the National Regulatory Research Institute.

SNAP was formed at the NARUC's 110th Annual Convention, and its mission is to foster a partnership between the FCC and state commissions for the purpose of strengthening consumer protections in the telecommunications marketplace. Specific focus areas include cooperation in consumer education, enforcement, and regulatory initiatives. Through SNAP, the FCC and states are able to share results of investigations into questionable business practices involving companies in the telecommunications industry. Through these efforts the FCC and the states have demonstrated their desire to work collaboratively to be more attentive to the needs of consumers and the concerns of our congressional leaders.

As you are aware, NARUC has sent several letters opposing H.R. 1542, the "Tauzin-Dingell bill." While I do not wish to address this bill at this hearing, I simply want to note that I am testifying on the bill before us as a stand alone bill.

Therefore, as stand alone legislation, I support the goal of increasing the penalties at the national level against companies found violating the FCC's rules and orders. Florida continues to receive complaints against companies that have already been fined or had settlements accepted by the FCC for various violations. It appears that, under certain circumstances, the current level of penalties is not adequate in removing the incentives to violate current law. Chairman Powell's proposals for additional fines suggests that the FCC's current level of fining authority is not sufficient to make some activities unprofitable. Finally, I suggest to the sponsors of this legislation that they consider clarifying that all penalties assessed on carriers be taken "below the line" (as required by the current FCC rules) and be excluded from customer rates.

STATE ARBITRATION DEADLINES

While I appreciate the sponsor's recognition of the need for states to arbitrate interconnection agreements, I am concerned that this bill provides only 60-day time frame for States to resolve these disputes. My concerns relate primarily to due process and the ability to build a clear record needed to render a fair decision. Currently, in Florida, when we address complaints regarding interconnection agreements, we have found that often the issues involved in these cases are very complex. In such cases, substantial testimony and a full discovery process may be needed to resolve these issues. Requiring that these cases be processed in just 60 days may impair our ability to address issues in a reasoned and well-informed manner.

The Florida Commission and its staff have been exploring ways to handle these types of complaints in a more expedited manner. The complexity of the issues involved in a complaint is one factor that will likely be taken into consideration when deciding whether a case should be ″fast tracked.″ Even if a case is "fast-tracked," the time frame under discussion for such an expedited process is a minimum of approximately 100 days.

RESERVATION OF STATE AUTHORITY

Finally, I appreciate the critical reservation of state authority in proposed section 252(e)(3) of the legislation to prescribe methods to ensure timely and effective compliance with any interconnection agreement, including the imposition of service quality performance requirements. The critical role service quality performance data plays in the transition to a more competitive environment is highlighted by NARUC's current position before the FCC opposing the elimination of service quality reporting requirements on the incumbent telephone companies.

CONCLUSION

In summary, I support increasing penalties at the national level; working together with the FCC to protect consumers from companies involved in deceptive business practices; and having states resolve disputes in a timely manner, but recommend that the 60-day time frame be increased to at least 100 days.

Mr. UPTON. Thank you, Mr. Jacobs.

Mr. Sarjeant?

STATEMENT OF LAWRENCE E. SARJEANT

Mr. SARJEANT. Good morning, Mr. Chairman and members of the subcommittee. Thank you for giving the United States Telecom Association the opportunity to testify and present its views on H.R. 1765, your recently introduced bill to increase penalties for violations of the Communications Act by common carriers.

My name is Lawrence Sarjeant, and I am USTA's Vice President for Regulatory Affairs and General Counsel.

Although its roots are in the local exchange industry, USTA has evolved into an association of multi-service telecom providers. Its members are ILECs, CLECs, IXCs, ISPs, CMRS providers, and video service providers. USTA's members service America's remote and rural communities from Alaska to Georgia, as well as its urban centers from New York to Los Angeles.

USTA believes that regulators, competitors, and customers have at their disposal today sufficient vehicles through which they can pursue penalties, damages, performance adjustments, and remedial conduct from common carriers when it is proven that a common carrier has violated the Communications Act or the Federal Communications Commission's rules.

For example, Section 209 damages provisions prescribe no cap on monetary damage awards in favor of complaining parties who successfully bring complaints against common carriers pursuant to Section 208.

Notwithstanding our belief, though, USTA understands that you and other public policymakers believe that there is a need for greater enforcement and increased penalties for common carrier violations of the Communications Act and the FCC's rules. Therefore, I would like to offer several observations and suggestions concerning modifications to the enforcement process that are intended to ensure that procedural fairness accompanies any enhancements to existing enforcement and penalty provisions.

If forfeiture penalties are to be increased, greater formality or structure should be incorporated into the proceedings leading to the assessment of a forfeiture penalty. A common carrier that is the target in a forfeiture proceeding should be entitled to an evidentiary hearing before a hearing examiner that is independent of the FCC staff that investigates the alleged violation and the FCC staff that brings the alleged violation forward for adjudication.

All testimony should be taken under oath, and the target common carriers should have the right to call witnesses and cross examine those witnesses called to present testimony against it.

Penalties in the amounts being considered should not be imposed without the accused having maximum due process protections. Penalties that are predicated upon a finding of wilful conduct require that "wilfully" be defined. The definition of "wilfully" should explic-

itly state that the alleged violator intended to violate the Act or the FCC rule.

In other words, the FCC must be made to prove that the alleged violator knew it was acting unlawfully. It should also be made clear that the FCC bears the burden of proof. Where wilful conduct must be shown, it should be proven by clear, cogent, and convincing evidence.

This higher burden of proof is warranted when sizable monetary penalties such as those presented in the bill are to be assessed as a way to punish common carriers for wilfully and repeatedly failing to comply with the provisions of the Act. This is particularly true when wilful conduct must be determined in a dynamic environment where rules are frequently changing in response to court decisions and changes in the telecommunications market.

Section 2 of H.R. 1765 provides for a dispute resolution process with respect to those matters that are subject to interconnection agreements approved by a State commission pursuant to Section 252. We agree that this is the best approach as these interconnection agreements are within the State Public Service Commission's jurisdiction, and no other regulatory agency is in a better position to resolve disputes concerning local interconnection agreements.

Finally, USTA is concerned about parity and proportionality. To the extent that forfeiture penalties in H.R. 1765 apply only to common carriers, it disregards the fact that communications firms that have historically not been treated as common carriers are now providing common carrier services.

Regardless of the labels attached to them, firms that provide services that are functionally equivalent to those provided by traditional common carriers should be subject to the same forfeiture provisions. Consideration should be given to having one forfeiture penalty schedule for all entities subject to the Communications Act.

Further, the FCC should be clearly instructed that the size of the common carrier, the number of residential subscribers it has, its service area, and other relevant factors, must be taken into consideration when determining the amount of the penalty to be assessed. The penalties are intended to be a deterrent to violations of the Communications Act, not a deterrent to a common carrier's ability to continue providing service to its customers.

Thank you.

[The prepared statement of Lawrence E. Sarjeant follows:]

PREPARED STATEMENT OF LAWRENCE E. SARJEANT, VICE PRESIDENT REGULATORY AFFAIRS AND GENERAL COUNSEL, UNITED STATES TELECOM ASSOCIATION

Thank you Mr. Chairman and Members of the Subcommittee for giving the United States Telecom Association (USTA) the opportunity to testify and present its views on HR 1765 your recently introduced bill to increase penalties for *common carrier* violations of the Communications Act of 1934. I am Lawrence E. Sarjeant and I serve as Vice President Regulatory Affairs and General Counsel of USTA. I appear at the hearing today on behalf of the entire Association, which comprises of over 1,100 members, including local exchange carriers ranging from the very smallest and most rural telephone company to the Bell Operating Companies, as well as non-ILEC affiliated CLECs.

Of course, I am not here today to say that we warmly welcome and embrace you and your co-sponsors' efforts to increase enforcement penalties. Having said that, we realize that policymakers such as yourself and your co-sponsors believe that there needs to be more enforcement and increased penalties for violations of the Act or the Federal Communications Commission (Commission) rules when the deregulation

contemplated by H.R. 1542 occurs. Under those circumstances, it seems that the purposeful thing for us to do is to provide you with the benefit of our thoughts and observations regarding the enforcement process and to make suggestions to you concerning how it can be modified to better ensure fairness and equitable outcomes.

First, let me say that one of the reasons that we believe that this effort to increase penalties is not warranted is that effective enforcement provisions already exist in the Act. They have been there since 1934, but the focus seems always to be on the forfeitures under Section 503, with little attention given to Sections 207, 208 and 209.

Section 207 provides that *any* person, meaning CLEC, DLEC, interexchange carrier, ISP, etc., may make a complaint to the Commission or bring suit against the common carrier in the United States District Court.

If an aggrieved person brings the complaint to the Commission, then Section 208 becomes operative. Section 208 provides that if a common carrier does or has omitted to do some act in violation of the Communications Act, then the Commission takes up this petition. This is now done through a newly created Enforcement Bureau established under Chairman Kennard to place more emphasis on enforcement.

After an investigation of not more than 5 months and a hearing, the Commission shall under Section 209 award damages if it determines the injured, complaining party is entitled to damages. There is *no* statutory limit on damages and the Commission has asserted its right to award permanent injunctive relief. Why is this not more effective than any forfeiture under Section 503?

Process

Let me start my process suggestions with the one that I believe is the most important. Today, the Commission process for imposing forfeiture penalties is what I would call an unstructured one. There are usually no evidentiary hearings, no testimony taken under oath and no witnesses to be cross-examined. The Commission does have the statutory discretion to present these matters to an Administrative Law Judge pursuant to Section 503(b)(3)(A), but it rarely, if ever, exercises this discretion. A hearing before an Administrative Law Judge should be made mandatory if the alleged violator requests such a hearing, especially when the action may result in a substantial forfeiture.

H.R. 1765 *does not* require such a hearing before an Administrative Law Judge, and we respectfully believe that it should. It is inappropriate and inconsistent with accepted principles of fairness for the Commission staff to serve as investigator, prosecutor and judge with respect to the adjudication of allegation sufficient to trigger a notice of apparent liability (NAL). Your bill follows the approach in current law of giving the Commission the discretion to present the issue to an Administrative Law Judge. Your bill, H.R. 1765, increase the penalties for some repeated violations to up to $20,000,000. A penalty in this amount requires, in our view, greater procedural due process, thus giving the accused at least a fair hearing before an impartial trier of facts and a fair opportunity to present its case, including the right to confront its accusers.

H.R. 1765 also will increase other penalties to up to $10,000,000. We believe that for these forfeitures, as well, there should be a right to a hearing before an Administrative Law Judge, at the option of the alleged violator. Section 554 of the Administrative Procedures Act governs the procedures for such a hearing. What we are seeking here is not novel—it is common practice in state regulatory enforcement proceedings. Penalties of any significant amount should not be assessed without there having first been a judicatory hearing.

Second, another process issue is the burden of proof. We would suggest that it be clearly established in your bill that the burden of proof be placed upon the government. The government should be required to prove its case by clear, cogent and convincing evidence, the standard applied in matters such as civil fraud where intention is required to be proven.

Willfully

Section 503(b), which H.R. 1765 amends, provides that forfeitures will be assessed against common carriers that willfully and repeatedly fail to comply with the provisions of the Act. We strongly urge you to define willfully. In a recent enforcement proceeding, the Commission issued a Notice of Apparent Liability in which it said the following:

> "It has been long established that the word 'willfully' as employed in Section 503(b) of the Act, does *not* require a demonstration that . . . *knew it was acting*

unlawfully. Section 503(b) requires *only* a finding that . . . knew it was doing the acts in question and that the acts were not accidental.[1]1

We have examined how the various Federal Courts [2]2 have interpreted the term willful in other federal statutes, and they all seem to have at least one common theme, which is that the alleged violator must have *intended* to violate the Act. The Commission says that if you did it, you therefore did it willfully unless it was an accident. The Commission, therefore, reads the word "willfully" out of the Act. This notion of intent to violate the Act must in our view be an essential part of your enforcement reform bill. Second, we would also urge that some allowance be made in this definition for ambiguity in the rules of the Commission which change so often. Since 1996, the Commission's rules regarding unbundled access to network elements have changed at least a dozen times not counting merger and Section 271 conditions imposed by the Commission. At this time, two Notices of Proposed Rulemaking are pending in the Advanced Telecommunications and Local Competition dockets, which will be the Sixth Further Notice of Proposed Rulemaking in that docket alone. The reason that they change so often is that the Commission most continually modify and reinterpret the law based on changing market conditions. While we haven't always agreed with the changes made by the Commission or its evolution of market conditions, increasing competition requires that the FCC consider obligatory action where market condition warrant it.

Dispute Resolution

Section 2 of H.R. 1765 provides for a Dispute Resolution process with respect to those matters that are subject to interconnection agreements approved by a State pursuant to Section 252. This provision makes common sense. We believe that under the 1996 Act that these interconnection agreements are within state Public Service Commission jurisdiction, and we welcome prompt resolution of disputes.

Section 252(c) requires that every interconnection agreement adopted by negotiation or arbitration must be submitted to the State Public Service Commission for approval. The Public Service Commission has the authority to approve or reject any agreement. In other words, there is no regulatory agency in a better position to resolve these issues than the State PSC that may have arbitrated the agreement and had to approve it.

Section 2's Dispute Resolution process follows the model for disputes arising during the agreement negotiation process provided for in Section 252 (b). The State PSC is given sixty days to resolve a dispute. This seems to us to be ample time. H.R. 1765 adopts the same approach Judicial review of a State Commission actions as is in current law regarding other interconnection agreement determination, namely the right of any aggrieved party to bring an action in Federal District Court to determine whether the agreement is in compliance with Section 251.

Parity and Size of Common Carrier

The increased forfeiture penalties in H.R. 1765 apply only to common carriers. Why should penalties be increased only for common carriers? Why not all persons subject to the Act's jurisdiction such as cable companies and broadcasters. We must begin to bring greater focus to comparable treatment for functionally equivalent services and not be driven to disparate treatment based on the old and irrelevant labels applied to today's multi-services communications companies. What is in the bill now applies to all carriers, but at the end of the process will it apply only to incumbent local exchange carriers or will it apply to just Bell Operating Companies. Singling out only segments of those regulated under the same Act is a concern to us.

Second, Section 503(b)(2)(D) of current law will be applicable to the increased and new penalties to be assessed under H.R. 1765. This subparagraph (D) requires the Commission to take into account the violators ability to pay among other considerations. Under this subparagraph; we would urge you to make clear to the Commission that this means that smaller carriers would have their size, number of residential subscriber and service area taken into account when prescribing a penalty. While intended to be a deterrent, revisions to the caps on penalties should not have unintended result of compromising the ability of any carrier to operate as on going business providing quality services to its customers. Forfeitures should be propor-

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[1] IN THE MATTER OF SBC COMMUNICATIONS, INC., DA 01-680 (March 14, 2001) at B1., 2001 WL 253187 (F.C.C.)

[2] See, *Valdak v. OSHRC,* 73 F.3d 1466, 1466-1469 (8th Cir. 1996)(willfulness is an act done voluntarily with either intentional disregard of or plain indifference to the requirements of the Act); *Printy v. Dean Witter Reynolds,* 110 F.3d 853, 859 (1st Cir. 1997)(willfull means deliberate or intentional).

tionate and the actual affect on consumers and competition should be taken into account.

Mr. UPTON. Thank you.

Mr. Solomon, welcome.

STATEMENT OF DAVID H. SOLOMON

Mr. SOLOMON. Thank you, Mr. Chairman. Good morning, Mr. Chairman and members of the subcommittee. We appreciate the opportunity to testify before you today, and particularly appreciate your interest in enhancing the FCC's enforcement tools, or, as you said this morning, Mr. Chairman, in giving us more ammo.

I also want to comment just how much we at the FCC appreciated the visit that you and Chairman Tauzin had earlier this week. People at the Commission were—their morale was very much increased by the sense from you and Chairman Tauzin that you are interested in helping us do our job better, and we appreciate that.

Strong and effective enforcement is critical to implementation of the 1996 Telecom Act. Chairman Powell has indicated on numerous occasions that he views enforcement as a central part of his vision for a more effective FCC dedicated to the deregulatory and procompetitive mission of the 1996 Act as envisioned by Congress.

Within the scope of the responsibilities that Congress has delegated to the FCC, he has charged us in the Enforcement Bureau with moving quickly to respond to either formal complaints that we get from carriers or competitors, and to requests for investigations, as well as reviewing our own information to look for possible areas for investigations.

And in partnership with the States, we continue to be strongly committed to doing our best to make sure that we can facilitate implementation of the local competition provisions of the 1996 Act.

And I want to mention with Chairman Jacobs here how much we at the FCC have appreciated the work he and others at NARUC have done in working with us to try to join resources so that when we work on consumer protection issues we are not overlapping with the States but we are working in concert.

As Chairman Powell recently indicated in his letter to you and other members of the leadership, we do believe that our ability to enforce the 1996 Act and other provisions of the Communications Act could be enhanced by giving us additional enforcement tools. And we are very pleased that H.R. 1765 incorporates some of Chairman Powell's proposals.

I am going to focus on two of those proposals. One is the increase in the statutory caps for forfeitures, and the second is the increase in the period for the statute of limitations. On the statutory caps, as several members have indicated this morning, and some of the witnesses, the current caps of $120,000 and $1.2 million really don't serve as a sufficient deterrent or sanction for large companies that have income of billions of dollars.

We think the increase tenfold to $1 million and $10 million will give us a significantly increased ability to have a deterrent effect from our actions and from the existence of the authority itself as well as impose serious sanctions in particular cases. And we strongly support that provision as well as the additional provision

to have doubling of the fines in cases where a carrier has violated a cease and desist order by the FCC or has engaged in a repeated violation that harms competition.

On the statute of limitations, let me explain a little some of the practical effects of the existing 1-year statute of limitations. We usually start an investigation in one of two ways. Either a competitor or another entity will come to us informally with information suggesting that there may be violations, or we will do a self-started investigation, perhaps based on reports that are filed by the carriers.

In either case, it is often several months into the 1-year statute of limitations period when we really get started. If someone is bringing us information, it takes them some time to put together—to notice that violations may be occurring, to put together information sufficient to us to convince us to look into it. So it may be several months into the period when they bring us what they think is strong evidence of a serious violation or a pattern of violations.

In addition, when we are looking into possible investigations based on reports we get from the carriers, typically the reports come in several months after the relevant period. For example, in June we might have a requirement that a carrier report on the first quarter from January to March. So if we get the report in June and it suggests violations in January, we have already eaten up about 5 months of the statute of limitations period.

Then, once we start an investigation, we look to the carrier to give us additional information. And we typically issue an inquiry letter that leads to interrogatories or a request for documents. That information has to be evaluated, and we also have had experiences where the carriers may have incentives to engage in delay tactics in dealing with us, such that we have to issue additional letters.

So we have had situations where, as we approach the end of the statute of limitations period and contemplate enforcement action, we either have to leave out some of the potential violations, have to go negotiate with the carrier potentially for an extension of the statute of limitations period, or have to work extremely quickly at the end to put our case together to beat the statute of limitations.

So while it doesn't sound exciting, the increase from 1 year to 2 years can have a significant practical effect.

So in summary, again, we appreciate your efforts to look at increasing our enforcement tools and look forward to continuing to work with you.

[The prepared statement of David H. Solomon follows:]

PREPARED STATEMENT OF DAVID H. SOLOMON, CHIEF, ENFORCEMENT BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Good morning Mr. Chairman and members of the Subcommittee. I am pleased to appear today on behalf of FCC Chairman Michael K. Powell regarding H.R. 1765. We appreciate the interest of Chairman Upton and others on the Subcommittee and the full Committee in enhancing our enforcement tools.

Strong and effective enforcement is critical to implementation of the Telecommunications Act of 1996. Chairman Powell has emphasized on numerous occasions his strong commitment to enforcement as a central part of his vision for a more effective FCC dedicated to implementing the competitive and deregulatory vision of Congress in the 1996 Act. Within the scope of responsibilities Congress has delegated to the Commission, he has charged the Enforcement Bureau to move quickly to respond to complaints or requests for investigations that we receive. Only in partnership with the states can we facilitate compliance with the local competi-

tion provisions of the 1996 Act and we will continue to work with the states to do so.

Our common carrier enforcement efforts generally take place in one of three contexts. First, through the formal complaint process set out in section 208 of the Communications Act, the Commission decides formal complaints between private parties. These are generally the equivalent of private law suits filed in court. Second, as an adjunct to the formal complaint process, Enforcement Bureau staff provides mediation assistance to litigants or potential litigants in an effort to help them reach a private settlement of their disputes where feasible. Third, the FCC conducts informal investigations pursuant to sections 218, 403 and 503(b) of the Communications Act. These investigations may lead to monetary forfeitures or consent decrees. While outside entities sometimes informally bring information to our attention in connection with such investigations, they are not parties to the investigation or any subsequent forfeiture proceeding. The only party to this type of FCC investigation is the subject of the investigation.

As Chairman Powell recently indicated in a letter to the leaders of the House and Senate Commerce and Appropriations Committees, which I have attached to my testimony, the effectiveness of the Commission's enforcement efforts could be increased with the help of Congress. We are pleased that H.R. 1765 incorporates certain proposals made by Chairman Powell and, not surprisingly, we strongly support these measures.

Specifically, I'd like to focus my remarks on two provisions of H.R. 1765 that would amend section 503(b) of the Communications Act: (1) the increase in the caps on the Commission's forfeiture authority for common carriers; and (2) the lengthening of the statute of limitations period for such forfeitures. Both of these provisions relate to the informal investigation process I mentioned before.

I. STATUTORY FORFEITURE CAPS

Right now, under section 503(b) of the Communications Act and the inflationary adjustments provided for under the Debt Collection Improvement Act of 1996, the Commission can fine common carriers only $120,000 per violation or per day of a continuing violation. In the case of a continuing violation, the total fine cannot exceed $1.2 million. Given the vast resources of the nation's large common carriers, including incumbent local exchange carriers and long distance carriers, this amount is an insufficient sanction or deterrent in many instances.

H.R. 1765 would increase the statutory caps 10-fold to $1 million per violation or per day of a continuing violation and $10 million for continuing violations. We think these statutory increases would significantly strengthen our enforcement authority against incumbent local exchange carriers and other common carriers. Through deterrence as well as the impact of sanctions that we impose, we believe compliance with the Act and the Commission's rules should be increased, to the overall benefit of consumers. We thus strongly support this provision. For similar reasons, we also support the proposal to increase the caps to $2 million and $20 million in situations where a carrier has violated a cease and desist order or where there has been a repeated violation that has caused harm to competition.

II. STATUTE OF LIMITATIONS

In addition to setting out forfeiture caps, Section 503(b) of the Communications Act spells out the procedure for the imposition of forfeitures and the timetable for the initiation of such actions. Under the statute, the Commission may impose a forfeiture through a hearing that begins with a Notice of Opportunity for Hearing or through a paper process that begins with a Notice of Apparent Liability. Under either process, the Commission may not impose a forfeiture penalty unless the carrier is notified of the charges and provided an opportunity to respond. For common carriers, the requisite notice must be issued within one year of the violation or violations at issue.

As Chairman Powell has noted, this one-year limitations period has often proved an impediment to the Commission's enforcement actions. While it is certainly important that the Commission commence forfeiture proceedings before the evidence relating to the alleged violations becomes stale, it is imperative that the Commission have enough time to conduct a meaningful investigation into the matter before issuing a publicly available notice charging the carrier with apparent misconduct.

Let me explain some of the practical constraints that the one-year limitation creates. In some situations, the Commission first hears about a violation from information informally provided by a competitor that has been harmed by the alleged violation. This can take several months as the harmed competitor determines whether there is a serious violation or pattern of violations at issue. In other instances, we

are first notified of potential violations through incumbent carriers' required filings with the Commission, which often cover time periods dating back many months. Thus, when the Commission receives these reports, we are often already fairly deep into the limitations period. Moreover, once we start an investigation, much of the evidence relating to the alleged violation resides with the carrier whose conduct is under investigation. Accordingly, in both types of situations, to determine whether there is sufficient evidence of a violation to proceed, the Bureau is often required to send a letter to the carrier requiring the submission of relevant information and documents, and then await the carrier's response. Moreover, because some carriers employ mechanisms to slow the progress of our investigations, the Bureau is often required to send follow-up letters to the carrier before obtaining the information sought. This cuts still further into the limitations period.

Because of the one-year statute of limitations for forfeiture proceedings, there have been instances in which the Commission has been constrained from commencing forfeiture proceedings. In other instances, we have been put in the unfortunate position of requesting that the subject carrier enter into an agreement to toll the running of the limitations period. While carriers often agree to such arrangements when they believe it is in their interest to do so, they do sometimes refuse. When they refuse, the Commission is left racing against the clock to make a decision on whether or not to initiate a forfeiture proceeding before the limitations period expires.

These problems would be largely solved if the Congress were to extend the statute of limitations in Section 503(b)(6)(B) of the Communications Act to two years. Thus, we thus strongly support this provision in H.R. 1765 as well.

Thank you again for this opportunity to testify. I would be happy to answer any questions you may have.

Mr. UPTON. Well, thank you very much. I appreciate all of your testimony. And I would just note for the record that as members are on other subcommittees, a number of folks have asked that they might be able to submit questions in writing, and we will take that opportunity to do so.

Mr. Solomon, you and I have had a chance to talk a little bit about this legislation earlier in the week, and we did, by the way, appreciate very much our visit to the FCC. I know that I look forward to going down again, and also we will visit a number of sites particularly close by here in the future.

Do you believe that the 2-year time limit is, in fact, adequate and sufficient on the statute of limitations?

Mr. SOLOMON. I certainly think it will help give——

Mr. UPTON. Does it need to go beyond 2 years, or do you think 2 years is——

Mr. SOLOMON. I think it will help give us the flexibility. Certainly, if Congress believes it should be somewhat longer, that would give us additional flexibility. Ultimately, it is a balance that Congress has to make between giving us the flexibility and ensuring that basically violations don't become stale in a way that is unfair to the target involved. But 2 years should certainly help.

Mr. UPTON. A number of folks have come to us and suggested that your enforcement team doesn't have enough bodies. It needs more individuals, particularly as you look at all of the complaints that are filed. What is the size of your enforcement staff?

Mr. SOLOMON. The size of the Enforcement Bureau is about 285 people, although that includes enforcement across the broad areas of responsibilities. About 150 of those people are in field offices and focus pretty exclusively on technical enforcement, and then about half are in Washington.

Certainly, as a government bureaucrat, we always like more resources. But we are heartened that Chairman Powell has allocated additional resources to enforcement and has charged us to go out

and hire some people with litigation and investigatory experience that will be able to help us.

Mr. UPTON. Well, one of the things I want to make clear is not only should you have the proper tools in your arsenal to go after those that violate the rules, but you also have the sufficient staff.

And I know that I look forward to working with the FCC, Chairman Powell, all the commissioners, yourself, as we look at having hearings later this year on FCC reform once we have the full complement of commissioners on board that, in fact they can help identify for us areas where you may need some more resources, and certainly I am prepared to try and help. Help is on the way, as I said the other day, to make sure that your resources—your human resources are adequate.

But I am interested in learning more about the Section 208 process. Could you describe how it works, how much time it often takes for those claims to get through, the amount of money that the FCC might have, in fact, recently assessed for Section 208? And also, confirm that it does go directly to aggrieved parties.

Mr. SOLOMON. Right. There are two distinct processes, just to back up for a second. The Section 208 process is the formal complaint process. In that, essentially we act as a judge in a private lawsuit. And if damages are awarded, those damages do go directly to the parties.

In the Section 503(b) forfeiture proceedings, those payments go to the Treasury, not into our pockets but to the Treasury.

In a Section 208 complaint proceeding, it is a formal complaint. It is like a lawsuit. There are opportunities for discovery in various stages of the proceeding. We have been trying to move very fast on these complaints. Historically, the FCC did not act as fast as it should have. When we started the Enforcement Bureau in November 1999, there was a backlog of about 180 formal complaint cases, many several years old, but the worst that we acted on was from 1989.

So one thing we have done is we have attacked that backlog, and there are a few cases still left but we have gotten out about 90 percent of the backlog, so that we are in a position to act more quickly on the new complaints.

The length of time that they take to some extent varies on the complexity. Some cases are subject to statutory deadlines, and obviously we meet those deadlines. We did have one case so far——

Mr. UPTON. Is there a statute of limitations on 208, Section 208 complaints?

Mr. SOLOMON. There is a 2-year statute of limitations on Section 208 complaints. So, actually, there would be a consistency if the forfeiture statute of limitations was increased to 2 years.

So the length of time depends on the complexity, but we are certainly proud of the fact that we are getting to the point where we can say that our complaints are decided in a matter of months rather than, historically, it was in a matter of years.

Mr. UPTON. And in recent months, how many 208 settlements have been reached? And, in fact, do you have details of some of the fines and who those parties might have been, or where those dollars might have gone?

Mr. SOLOMON. I don't know off the top of my head cases where we have awarded damages.

Mr. UPTON. You might be able to submit that for the record.

Mr. SOLOMON. Okay. I will do that.

Mr. UPTON. That might be sufficient.

My time has expired. Mr. Stupak?

Mr. STUPAK. Thanks, Mr. Chairman.

On the Section 208, if it is 2 years now, should that be extended longer, that statute of limitations?

Mr. SOLOMON. Again, that is a judgment call of balancing various figures.

Mr. STUPAK. So how do you define it in trying to—in your Enforcement Bureau in trying to process these cases? Do you find you have enough time, you don't have enough time? I guess we have to ask you, because you are the guys who deal with it.

Mr. SOLOMON. I think in the damages context for private complaints we have not found the 2-year statute of limitations to be a particular problem. One of the procedures we have is that in the first instance a complainant can file an informal complaint, which basically meets the statute of limitation.

So if they are running up against the 2-year period and haven't been able to get enough information to put together a formal complaint that meets our rules, they can essentially file a letter that basically serves for statute of limitations purposes, that is an informal complaint.

It doesn't get adjudicated; it gets served on the other party, and there is potentially an attempt for them to settle it. So I don't think that has been a major problem.

Mr. STUPAK. Okay. When Chairman Powell testified, he asked for an increase of the forfeiture amount to about $10 million, and an increase in the statute of limitations, which is 1 year, to 2 years. I would assume that the Chairman's recommendation would serve as a floor and not as the ceiling?

Mr. SOLOMON. Yes. He said at least those amounts.

Mr. STUPAK. Okay. In hopes of ensuring that we don't need to come back here again in a year or 2 to increase the FCC's enforcement power, shouldn't we give—attempt now to give the FCC more authority on forfeiture amounts and the length of time to pursue proceedings?

Mr. SOLOMON. Well, the legislation certainly is a positive step, and I don't know that there is a magic number of what is the right amount. But, I mean, our main goal at this point is seeing an increase. And if Congress chooses to make it higher than the 2 million, that presumably would increase the deterrent effect even further.

Mr. STUPAK. And besides the statute of limitations and the $10 million, is there anything else in your Enforcement Bureau—you said it has been up since, what, 1999, I believe you said?

Mr. SOLOMON. Right. Right.

Mr. STUPAK. Anything else you can think of that is not in H.R. 1765 that should be included, or some other ways to help you do your job?

Mr. SOLOMON. Some other possibilities that were mentioned in Chairman Powell's letter that the subcommittee might want to consider—these provisions focus on the Section 503 forfeiture process.

In the formal complaint process, currently we can award damages, but it is limited to compensatory damages, which essentially means that if after we adjudicate the complaint we find that, for example, if the rate should have been one rather than 10, the damages would be nine.

So, in essence, the violator pays interest but nothing has really happened to him other than he has to give back what the other party deserved to begin with. So we have suggested the possibility of punitive damages, sort of similar to the treble damages in the antitrust laws, which would serve as an additional penalty and deterrent against carriers.

Some other possibilities would be giving us the authority to award attorneys costs or fees in cases where we think there may have been particularly strong misbehavior or misbehavior in the litigation process itself.

And then another possibility would be some sort of requirement for liquidated damages in the interconnection agreements to basically say that, if certain requirements aren't met, it is guaranteed that the incumbent LEC in this case would pay to the CLEC a certain amount to make up for that problem, without having an adjudication. It would be just automatic.

Mr. STUPAK. Thanks.

Mr. Holland, Chairman Powell indicated that the need for increased enforcement authority is necessary in part to deter the violations that are leading to the demise of the CLECs. The Chairman specifically refers to measures to compensate harmed CLECs, besides cease and desist measures and the potential deterrent effects of increased penalties.

In your view, does the bill provide such increased compensation to CLECs that suffered the effects of these violations? Is it adequate? That is what I am asking.

Mr. HOLLAND. I do not think it is adequate in that regard, because to be adequate it has to be something that gets the attention of senior management. I will just give you an example: $10 million would get my attention because that is almost 10 percent of my quarterly revenue, $1.2 million would also get my attention, as Chairman and CEO, because that is about 1 percent of my revenue.

You know, $12,000, that wouldn't make much difference. Likewise, if you apply that same test to a large ILEC with about $15 billion in quarterly revenue, $10 million gets lost in the accounting in a quarter. I mean——

Mr. STUPAK. Just a part of doing business.

Mr. HOLLAND. Yes. It is truly just a cost of doing business. I mean, they spend more on that on local—more than that on local advertising or something, because that is less than one-tenth of 1 percent.

Now, if you raise that limit up to 1 percent, like I was talking—like what $1.2 million would be to me, that is $150 million. I can guarantee you with—let us take Verizon as an example. The Bells would be ringing with—at high decibel levels in the executive suite if the FCC were even threatening Verizon with a $150 million fine.

You would get the chairman's attention, and I guarantee you resources would be brought to bear and heads would roll.

That is what it really takes. And it is the type of thing, you know, almost like those nuclear weapons that sit—used to sit in the silos in North Dakota. You really didn't have to fire them, but the deterrent—the fact that they were there has some effect.

But, really, it has to be sufficient enough to impact quarterly results. And 1 percent of revenue will impact quarterly results; .1 percent will not.

Mr. STUPAK. Thank you.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you, Mr. Stupak. I neglected to say from the great State of Michigan.

I recognize the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Although this hearing is on 1765, we all know it is sort of tied to our last week's activities. And I had an e-mail from my brother-in-law last night. He was updating his e-mail address, and he said, "Here is my new e-mail address. I now have high-speed internet access through the cable. It is a little more expensive, but it is"—and he is—affectionately I call him—he is a computer geek, so he is——

Mr. UPTON. Did he ask you about 602(p)?

Mr. SHIMKUS. No, he did not. And he, in essence, said, "This is exciting, but it is a little more costly."

So I want to start out and just ask Chairman Jacobs, what regulatory authority do you have over the cable industry?

Mr. JACOBS. Let me start with Florida. We have none at the State commission level. And, generally, around the country you will find that State commissions have little, if any, authority. I know there is one State, and I can't remember which State it is, that has some authority.

Mr. SHIMKUS. Thank you.

Mr. Solomon, what regulatory authority does the FCC have over the cable industry?

Mr. SOLOMON. Basically, we have the regulatory authority that is set out in the Cable Act of 1984, and in 1992, which is a series of discreet issues. It is not sort of comprehensive regulation over everything, but Congress gave us the authority of certain programming issues, certain ownership issues, and then in the 1996 Act Congress deregulated our rate authority.

Mr. SHIMKUS. So very little.

Mr. SOLOMON. Well, there is authority on certain discreet issues.

Mr. SHIMKUS. Is there authority over high-speed internet services over cable?

Mr. SOLOMON. I think these are issues the Commission is looking at.

Mr. SHIMKUS. That is fair.

Mr. Sarjeant, this question is for Mr. Sarjeant, and, again, back to Mr. Solomon. Mr. Holland stated in his testimony that one way to curb the motivation to engage in anti-competitive behavior is to structurally separate RBOCs and retail and wholesale operations.

What is your view of this idea? And do you think it would work?

Mr. SARJEANT. It is an idea that I think is not going to, in the end, help the people who we really must be focusing on, and that

is the consumers, because what it does is deprive companies who are currently integrated of the efficiencies of integration, if you wind up separating them out. And the remedy certainly does not do anything to cure the problems that the CLECs are having with the capital markets. It is not going to help them with their capitalization.

So, in effect, what it does is perhaps inflict some inefficiency pain on large companies or integrated companies today, but for no gain for consumers and with little benefit, if any, for CLECs. So it hardly seems worth it.

Mr. SHIMKUS. Mr. Holland, since I used your name, do you want to respond?

Mr. HOLLAND. Yes, sir. I had suggested structural separation or functional separation, one or the other, as something that would be—that I would favor if greatly increased enforcement and a much bigger stick—much bigger penalties didn't get the job done. I am not advocating that it be done today.

I think ultimately——

Mr. SHIMKUS. If I could interrupt, and we will just keep the dialog, when you say "much greater penalties," much greater penalties as close to what is occurring in this legislation or even greater?

Mr. HOLLAND. As I mentioned before, $10 million would be nothing to a company that has $15 billion in quarterly revenue. It has to be significant enough to impact their quarterly financials, because that is what gets senior management's attention. I know that from my own experience.

And, certainly, something like 1 percent of revenue will get you there. That is—in fact, having it based—pegged to percent of revenue is very consistent with the USF funding, but I think that that is worth a try, doing that.

I think ultimately, though, if you are going to get to where every citizen in America has a competitive choice, you are going to ultimately wind up with structural separation, because, as an example, you never would have had the market share shifts of the magnitude you did in long distance if the Bell operating companies had had an incentive to discriminate in favor of AT&T vis-a-vis MCI.

The reason for that was to open that market. I think ultimately that will happen in the local market, but I would say this. I think it will happen voluntarily at some point in time. I think the operating companies will come to the conclusion that if they really do—say, Verizon and SBC, if they want to be major global players, they really need to move toward true deregulation, which is to give up the bottleneck facilities, either to a tracking stock or a spinoff to shareholders.

And those bottleneck facilities, when you get right down and cut to the chase, are the local loop and the collocation space. And then everyone is dealing with it separately.

A great model for that is Empire City Subway in New York, which is a wholly owned subsidiary of Verizon that owns all of the communications conduit that everybody uses at the same rate, which is a tariff rate. So I think that is ultimately going to happen. We are not proposing it today, but if greater enforcement doesn't get the job done, we would propose it in the future.

Mr. SHIMKUS. Mr. Chairman, if I may, I would like to get the FCC's response to the initial question. Do I need to restate it or——

Mr. SOLOMON. This may sound overly bureaucratic, but as Chief of the Enforcement Bureau, I sort of view my role on these issues as Congress did not include that in the 1996 Act, so our job is to enforce what is there.

Mr. SHIMKUS. You guys are speaking truth. I am glad to hear that. We may have—you know, it is a legislative prerogative, and you would have to enforce the legislative prerogative. And I appreciate that.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you, Mr. Shimkus.

We have another vote, so I am going to ask maybe one or two questions, and maybe, Bart, do you have an additional question you want to ask as well?

Actually, Mr. Engel is here. I should—Mr. Engel, do you have any questions? I should ask, have you voted yet or not?

Mr. ENGEL. I have not.

Mr. UPTON. Okay.

Mr. ENGEL. I have learned in 13 years to make the 3-minute dash over to the Capitol.

Mr. Solomon, are cable operators providing telephone service classified as common carriers, and would they be subject to these fines?

Mr. SOLOMON. The issue of how cable should be classified for various services is in the process of litigation and consideration in a number of contexts, so I don't want to answer it too generally other than to say that, to the extent they are acting as a common carrier, then they are subject to the rules governing common carriers. There is a lot of litigation over the issue of whether, in fact, or in what context they are acting as a common carrier.

Mr. ENGEL. Okay. Thank you. In your testimony, you said that you strongly support extending the statute of limitations. How often does this interfere with the FCC's oversight abilities? Is 2 years enough? Should it be three?

Mr. SOLOMON. I think 2 years will be of great help. We have had a lot of situations where because of the nature of our investigations we end up running against the 1-year statute of limitations, because we are still getting information from the carrier and evaluating it.

But my sense is that it will make a big difference. We are usually sort of almost there, so giving us another year will really make a big difference.

Mr. ENGEL. Okay. Thank you.

Mr. Sarjeant, in your testimony, you say that the FCC could use Sections 207, 207, and 209 of the Communications Act to enforce its provisions. Why, in your opinion, is the FCC not doing so now?

Mr. SARJEANT. Well, I think the FCC is doing so when a private party brings a dispute to it. As Mr. Solomon mentioned when he testified earlier, Section 208 is the adjudication of private party disputes. So while the FCC does have its own authority to initiate a complaint under 208, generally speaking, it awaits the parties to bring—a party to bring a dispute with another party to it.

So I believe there have been 208 complaints that go to the question of interconnection and the application of Section 251(c) and the rights and responsibilities under it.

Mr. ENGEL. Mr. Solomon, would you agree to that or—with that, or would you——

Mr. SOLOMON. Certainly, it is a process that is available and we get many complaints. I think in the local competition area the complaints we have acted on have been more in the 271 area about whether the BOCS have in certain ways entered into the long distance market too soon. We do have some recently filed complaints that address other local competition issues as well.

The other thing I would add is that, as I mentioned, compensatory damages are available, although it is often the case that what we will do is issue a ruling on liability and set the structure for damages, and then the parties will settle on damages. So it is not as often that we actually decide what the damages are.

Mr. ENGEL. Thank you.

Mr. Halprin, when the FCC Chair, Mr. Powell, was before our subcommittee, he stated his desire to have less upfront regulation, but then on the other end he said if he found someone was not playing by the rules he wanted the authority, and I am quoting him, "to hit them hard and hit them fast." In your opinion, does H.R. 1765 succeed in this goal? Does it hit them where it hurts?

Mr. HALPRIN. Mr. Engel, I think it is a good start. As I indicated, I think there are a number of other tools that can be added. I could not agree more with Chairman Powell, a) that it is important to move toward deregulating services and markets which are competitive, and, second, that adequate deterrence is necessary.

Right now, the local phone companies are—I don't know if it is 3 million regulations, but are, as the Chairman said, pervasively regulated. The FCC has 8, 10 different ways to impact it, and one of the excellent things that Chairman Powell has done is said that he is going to use the statutory and regulatory mechanisms and not go into this "let us make a deal" attitude that we have had for too long, where almost every enforcement mechanism has been the result of private, off-the-record discussions.

So I am extremely hopeful that Chairman Powell will, in fact, use those enforcement mechanisms, both for deterrence and for punishment where necessary, and the approach that he has taken is exactly right. I do think that it can be enhanced, particularly in the area where there are not regulations—that is, small businesses and residential consumers.

Mr. ENGEL. Thank you very much.

Thank you, Mr. Chairman.

Mr. UPTON. We are down to the 3-minute dash time. I appreciate your testimony. I want to announce again that those members who were not here to answer questions will submit some for the record. If you could answer them quickly, that would be appreciated.

This hearing is now adjourned. Thank you.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned.]